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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT J. COAR,

Petitioner,

vs.

JOSEPH KAZIMIR, ROCCO MORONGELLO, WILLIAM LEVINE, DONATO DESANTI, and ROBERT DUDIK, as Trustees of the Pension Fund Mid-Jersey Trucking Industry-Local 701, and PENSION FUND MID-JERSEY TRUCKING INDUSTRY LOCAL 701,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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July 7, 1993

QUESTION PRESENTED FOR REVIEW

The question presented for review is the issue reserved by the Court in Guidry v. Sheet Metal Workers Nat. Pension Fund, 493 U.S. 365, at 373 (1990), namely,

> . . . whether the remedial provisions contained in § 409(a) [29 U.S.C. § 1109(a) of the Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, et seq. ("ERISA")] supersede the bar on alienation in § 206(d)(1) [of ERISA, 29 U.S.C.§ 1056(d)(1)]. . . [?]

The decision below of the Third Circuit Court of Appeals on this question is in conflict with the decision of the Fifth Court of Appeals in Herberger v. Shanbaum, 897 F2d 801 (5th Cir. 1990), cert. denied, 111 S. Ct. 60 (1990).

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No.

ROBERT J. COAR,
Petitioner,

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JOSEPH KAZIMIR, ROCCO MORONGELLO, WILLIAM LEVINE, DONATO DeSANTI, and ROBERT DUDIK, as Trustees of the Pension Fund Mid-Jersey Trucking Industry-Local 701, and PENSION FUND MID-JERSEY TRUCKING INDUSTRY LOCAL 701,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Robert Coar respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit, insofar as it held, with respect to the issue specifically reserved by the Court in Guidry v. Sheet Metal Workers Nat. Pension Fund, 493 U.S. at 373, that "...the remedial provisions contained in § 409(a) [of ERISA, 29 U.S.C. § 1109(a)]..." do "...supersede the bar on alienation in § 206(d)(1)..." The decision below is in direct conflict with the decision of the Fifth Circuit in Herberger v. Shanbaum, 897 F.2d 801 (5th Cir. 1990).

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, reversing the district court, is to be reported in Coar v. Kazimir, 990 F.2d 1413 (3d Cir. 1993), and is reproduced in the Appendix to this petition. (Pa 1-35)[1] The decision of the district court in favor of petitioner Coar, granting him summary judgment is reported at 792 F.Supp. 345 (D.N.J. 1992). (Pa 42-59)

JURISDICTION

The United States Court of Appeals for the Third Circuit reversed the decision of the district court on April 15, 1993, and denied petitioner Coar's timely-filed Petition for Rehearing on May 11, 1993. This Petition for a Writ of Certiorari was filed within 90 days of the aforesaid denial. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 409(a) of ERISA, 29 U.S.C. §1109(a), provides in pertinent part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan result-

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[1] "Pa" refers to the Appendix to this Petition for Certiorari.

> breach,...and shall be subject to such other equitable or remedial relief as the court may deem appropriate[.]

Section 206(d)(1) of ERISA, 29 U.S.C. §1056(d)(1), provides that

> [e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

STATEMENT OF THE CASE

Petitioner, Robert Coar ("Coar") is nearly 70 years old. His wife is in her late 50's. They support a 20 year old son who is a college student. Coar is a former trustee of the Mid Jersey Trucking Industry-Local 701 Pension Fund ("the Fund"), which is governed by the Employment Retirement Income Security Act of 1974 ("ERISA"). In 1983, Coar retired and began receiving a pension from the Fund. In 1987, Coar was convicted of conspiring to receive kickbacks in relation to his service as former trustee of the Fund, in connection with the placement of $20 million of the Fund's assets with Omni, a Florida mortgage company. See United States v. Zauber, 857 F.2d 137 (3d Cir. 1988), cert. denied, 489 U.S. 1066 (1989).

The respondents ("the Trustees") are the Fund's current Trustees. In 1984, before Coar was indicted, the Trustees filed claims against Coar, his former co-trustee, and others, under § 409(a) of ERISA, 29 U.S.C. § 1109(a) and RICO ("the civil case"). In September of 1990, a determination was made as to the ERISA and RICO liability of Coar and the others in the civil case, but no money

damages were then assessed.[2] In April, 1991, the Trustees began withholding payment of Coar's pension benefits as a set-off against a potential judgment.

In July of 1991, Coar filed an action against the Trustees in the United States District Court for the District of New Jersey, under 29 U.S.C. § 1132(a)(1), to recover the withheld benefits, and to require payment of future benefits ("the ERISA case"). In April, 1992, while Coar's suit was pending, the Fund obtained a judgment of over $25 million on the ERISA claims against Coar and others in its pending civil case. However, in May of 1992 the district court granted summary judgment in favor of Coar in the ERISA case, and in June 1992 entered judgment in his favor (Pa 60-61). The district court held, on the basis of the construction of § 206(d)(1) in Guidry, that § 409(a) of ERISA could not be read as intending to supersede the anti-alienation provision of §206(d)(1), even though court characreized the result it found the statute compelled as "unpalatable in this case...." Coar v. Kazimir, 792 F.Supp. 345, at 351 (D.N.J. 1992) (Pa 58) (emphasis added).

The Trustees appealed. On April 15, 1993, the Third Circuit issued a decision reversing the district court (Pa1-33). In a separate concurrence, Judge Becker rejected most of the majority's reasoning and basically agreed with Coar's statutory construction argument, but nonetheless concurred in the result because Judge Becker deemed the contrary result to be "counter-intuitive." (Pa 35) Coar

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[2] Prior to this time the Trustees had recovered several million dollars in settlements with various banks, brokerage houses and a major law firm.

then filed a timely Petition for Rehearing pursuant to F.R.A.P. 35 and 40, which was denied on May 11, 1993 (Pa 36)

REASONS FOR GRANTING THE PETITION

Petitioner seeks review of the decision below under Supreme Court Rule 10.1(a). The result reached by the Third Circuit is in direct conflict with the decision of the Fifth Circuit in Herberger v. Shanbaum, 897 F.2d 801 (5th Cir. 1990), cert. den., 111 S.Ct. 60 (1990), on the identical question of federal law relating to the interplay between § 206(d)(1), the anti-alienation provision of ERISA, and § 409(a), the general remedies section, the same question which the Court reserved on in Guidry.

The facts here obviously are somewhat reminiscent of Guidry, where the petitioner also was a pensioner who had been a former pension fund trustee and union official. Guidry had been convicted of actually embezzling nearly $1 million from the union. The question before the Court was the right of a union to recover a judgment in its favor by imposing a constructive trust on the pensioner's benefits from a pension fund affiliated with the union. Guidry held that ERISA pension benefits may not be subjected to a constructive trust to enforce collection of the sponsoring union's judgment. However, the Court specifically stated that:

> We need not decide whether the remedial provisions contained in § 409(a) supersede the bar on alienation in § 206(d)(1), since petitioner has not been found to have breached any fiduciary duty to the pension plans.

Id. at 373.

Prior to Guidry, in Crawford v. La Boucherie Bernard Ltd., 815 F.2d 117 (D.C. Cir. 1987), the District of Columbia Circuit had held that, notwithstanding the "anti-alienation" provision of § 206(d)(1), ERISA's legislative history supported an equitable exception to § 206(d)(1) in such situations, as reflected in the authority to award "equitable and remedial relief" for ERISA fiduciary violations granted courts under § 409(a) of ERISA, 29 U.S.C. §1109(a).

As noted, the first and previously the only circuit court decision on this question after Guidry was decided was that of the Fifth Circuit in Herberger v. Shanbaum, supra. The court there held that, notwithstanding the Court's reservation on the precise issue, Guidry's broad rejection of any equitable exceptions to the command of § 206(d)(1) had fatally undermined the reasoning of Crawford, as well as explicitly overruling several earlier cases upon which Crawford had relied. 897 F.2d at 803-804.

In the present case, the district court adopted the Fifth Circuit's analysis in Herberger. Thus, even while acknowledging that the result was "unpalatable in this case," the court held that "it is nevertheless in accordance with law, and change must come from Congress rather than from the court." Coar, 792 F.Supp. at 351 (Pa 58).

The judgment of the district court was reversed on appeal. The majority of the Third Circuit panel in the present case differed with the Fifth Circuit in Herberger, as well as the district court, and upheld the Trustees' action on the basis that the remedial provisions of § 409(a) of ERISA do create an examption in favor of a

pension fund from the bar on alienation in § 206(d)(1). Thus the Court is now squarely presented the Court with the opportunity to address this question in the context of a conflict between the two circuit courts of appeal that have dealt with this issue post-Guidry. Supreme Court Rule 10.1(a).

The equities in this case are similar to those in Guidry. However, the practical importance of this decision below resides not in its underlying facts, but rather in the impact of its doctrine. The peril implicit in the Third Circuit's decision is that this doctrine must apply in all cases in which a pension fund seeks to collect a judgment based on a fiduciary violation of ERISA against one who is also beneficiary of the fund, and allows no hedging.

Unlike the district court, which observed that the result - upholding the bar against the efforts of pension fund to collect a judgment against a fiduciary-pensioner by garnishment of his pension, while it was unpalatable in this case . . ." (Pa 58), but implied this was not necessarily so in other cases, the Third Circuit majority's view is absolutist and assumes "unpalatability" as a constant. Instead the majority conspicuously failed to address the fact that many, and probably most of the cases brought under § 409(a) do not involve fiduciary defendants who are also participants in the plan. And even in cases in which the defendant is also a plan participant, application of § 206(d)(1) does not effect the ability to collect a judgment from a defendant's non-pension assets.

Even more critically the majority particularly failed to consider that in many of the ERISA cases in which its

ruling will be applied the equities will be far different from those in Guidry or in this case. In actuality most do not involve criminal conduct or even scienter. In fact, many such cases do not even involve conduct which could be the basis of violation of fiduciary duty under common law.

Specifically, the court below never gave any weight to the fact that the threshold for a "fiduciary" violation of ERISA - giving rise to liability under § 409(a) - is not criminal conduct or even "arbitrary and unreasonable" action. Under § 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1)(B), the standard of conduct for ERISA fiduciaries, with certain exceptions, is only that which "a reasonable man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Struble v. N.J. Brewery Emp. Welfare Trust Fd., 732 F.2d 325, 333 (3d Cir. 1984).

Additionally, an ERISA fiduciary has a duty to "diversify the investments of the plan so as to minimize the risk of large losses,..." under ERISA § 404(a)(1)(C), and discharge his duties "in accordance with the documents and instruments governing the plan...," under ERISA § 404(a)(1)(D).

Likewise, Section 405(a) of ERISA, 29 U.S.C. § 1105, imposes vicarious liability on a trustee for which he may he held for damages under § 409(a) if, through omission, he allows another fiduciary to breach a duty under § 404(a)(1), or has knowledge of such a breach but fails to remedy it. Thus, lay trustees can be held liable even for imprudent investment decisions made by professional asset managers they employ.

But § 409(a) does not purport to "graduate" either liability or the availability of remedies against a fiduciary based on whether a loss arises from criminal conduct, or just bad judgment. And Guidry specifically rejected the notion that liability arising from "criminal misconduct" might be a special case by itself warranting a "generalized equitable exception" to § 206(d)(1). 493 U.S. at 376.

Hence, staggering financial liability against a fiduciary can be founded under § 409(a) as readily upon a technical ERISA violation, essentially involving only a negligent act or omission, as it can be based upon a criminal violation, such as embezzlement, as in Guidry, 493 U.S. 365, or agreeing to take a kickback, as in Coar's case.[3] Thus, without a trustee or other ERISA fiduciary acting in any way that is remotely criminal or even "arbitrary and capricious," any violation of any of such duties nonetheless may subject him to immense money damages under § 409(a). Struble, at 333-334.

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[3] See, e.g., GIW Ind., Inc. v. Trevor, Stewart, Etc., Inc., 895 F.2d 729, 733 (11th Cir. 1990) (fiduciary's failure to adequately investigate market conditions and adequately diversify investments in light of fund's cash flow needs, before making investment decisions); Blackwell v. Transamerica Occidental Life, 707 F.Supp. 437, 440 (D.Nev. 1987) (applying "prudent man" standard to impose liability on fiduciary for "lack of adequate record keeping and failure to verify eligibility...," even though actions were "more closely aligned to negligence in fund management decisions..."); and Teamsters Local No. 145 v. Kuba, 631 F.Supp. 1063, 1070-71 (D.Conn. 1986) (failure to consult counsel in connection with adoption of amendment to plan).

There is also another practical dimension to the problem of the interplay between §§ 409(a) and 206(d)(1): The reality of union politics is that a "spoils system" often operates and extends to affiliated pension funds, so that most often trustees representing the employees are either the incumbent officials of the union, or chosen by them. Similarly other fiduciaries often owe their appointments to a relationship with incumbent union officials or incumbent management. Not infrequently litigation under § 409(a) is the consequence of upheavals in intra-union politics, in the wake of trustees or other fiduciaries aligned with defeated union officials being replaced by a slate named by the insurgents. Reprisal can often be the driving force behind such litigation.

Obviously, almost the only context in which the issue in the present case can arise is in a situation in which a fiduciary is also a pensioner, or eligible for a pension due to advanced age and disability. The law made by the Third Circuit majority in this case, in which it found a different result would be distasteful, is the same law that courts in the Third Circuit must apply in <u>every</u> case invoking § 409(a) to compel a breaching trustee "to make good to the plan." (Pa 29)

Given the "prudent man standard," the prospect is hardly remote that many and perhaps most of those whose pensions are placed in jeopardy by the decision below will not be "dishonest trustees, such as Coar," but instead, basically honest people, who, in their late 60's and 70's, perhaps in declining health, had the misfortune to back, or be aligned with, the wrong side in a union political dispute.

None of these considerations was addressed by the Third Circuit. The majority instead devoted itself to somewhat opaque, and inconclusive textual analysis. It ultimately was able to reach the conclusion it obviously had pre-ordained only by transposing the issue as originally stated by Guidry into a question which might be paraphrased as: Whether the bar on alienation in § 206(d)(1) supersedes the remedial provisions contained in § 409(a)? By implicitly restating the issue in this manner, the majority effectively reversed the focus of the specificity inquiry away from the language of §409(a), as posed by Guidry, and placed the burden of specificity entirely upon the language of §206(d)(1). Using this device, the majority predictably emerged with the conclusion that because § 206(d)(1) does not specifically refer to any limitation upon the use of any of the remedies available to a pension fund under § 409(a) against a breaching fiduciary, a Congressional intent could be divined to limit the applicability of the anti-alienation provision, § 206(d)(1), only to instances in which third-party creditors seek recourse to pension benefits (Pa 21).

Without citing any authority, the majority then postulated that the language of § 409(a) which provides that a breaching fiduciary "shall be liable to personally make good to the plan any such losses. . .," actually proclaims a policy "which directs the courts to ensure that the wayward trustee fulfills this obligation to make restitution through whatever remedy the court deems appropriate in the circumstances. . ." (Pa 20)

Plainly what the majority in essence held was that this language alone basically transforms the pension fund into a super-priority creditor vis-a-vis any breaching trustee-pensioner or other fiduciary-pensioner. It failed to consider that this same logic which impelled it to disregard

the anti-alienation feature of ERISA in this situation would also seem to mandate overcoming any other federally recognized defenses, immunities or exemptions a party indebted to an ERISA fund on a fiduciary claim might otherwise seek to be assert.

In addition, the majority failed to explain why it found this language in § 409(a) to be any more specific in its intention to overcome the bar of § 206(d)(1) than the language of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 501(b), which was analyzed in Guidry. LMRDA §501(b) is nearly indentical to § 409(a) in providing a right of action "to recover damages or secure an accounting or other relief for the benefit of the labor organization" - arising out of violation of § 501 of the LMRDA. In Guidry, the Court assumed, without deciding, that this language in the LMRDA "may authorize, in some circumstances, the imposition of a constructive trust," 493 U.S. at 375, the mechanism suggested by respondent in Guidry as the means by which to recoup the moneys embezzled from the union.

Moreover, neither of the opinions in the court below confronted the further observation in Guidry that had respondent's position been accepted there,

> ERISA's anti-alienation provision would be inapplicable whenever a judgment creditor relied on the remedial provisions of a federal statute. Such an approach would eviscerate the protection of §206(d) . . .

Id. Given the fact that the remedial provision of virtu-

ally every federal statute which creates civil liability contains nearly identical, or at least similar, language to that contained in § 409(a), the Court's reasoning in Guidry should command upholding the primacy of § 206(d)(1) in this case as well.

Even more recently Patterson v. Shumate, 112 S.Ct. 2242 (1992), conclusively rejected a rationale virtually identical to that embraced by the majority here in its opinion below. Specifically, the Court dismissed the argument that "the Bankruptcy Code's policy of ensuring a broad inclusion of assets in the bankruptcy estate" would be frustrated if it were held that § 206(d)(1) barred recourse to a debtor's pension rights. Patterson, 112 U.S. at 2249. Plainly the majority's rationale below was nothing more than a restatement of the same theme repudiated in Patterson.

The District of Columbia Circuit's pre-Guidry decision in Crawford was the purported authority for the Third Circuit majority finding in §409(a) a supreme and over-arching policy to achieve "restitution through whatever remedy the court deems appropriate in the circumstances. . . ." (Pa 20), based on Crawford's similar reading of §409(a) as intending to confer on courts "broad authority. . .to fashion remedies for redressing any breach. . . ." 815 F.2d at 119 (emphasis added).

It is noteworthy, however, that no decision of this this Court has given the slightest indication that § 409(a) should be viewed as anything beyond a more-or-less boiler-plate federal remedies provision. Certainly, the Court has never held § 409(a), or any similar provision to be an expression of a policy so clear that it should sweep aside the policy which Guidry found to be unambiguosly embodied in § 206(d)(1), or indeed in any

other statutory exemption.

Belying the majority's further suggestion below (Pa 18) that the Fifth Circuit misspoke in Herberger, 897 F.2d 801, when it concluded that the intent of § 206(d)(1) was "clear," (Pa 18), the Court once again was notably emphatic in Patterson, 112 S.Ct. 2242, that both the meaning and intent of § 206(d)(1) are indeed clear. Specifically, in Patterson it was held that "the clarity" of § 206(d)(1) "obviates" reference to legislative history, Id. at 2248, and may even make irrelevant "policy considerations" associated with other statutory provisions, because "the language of [§206(d)(1)] is so clear. . . ." Id. at 2249 (emphasis added). In this respect, Patterson simply echoes the conclusion of Guidry as to the clarity with which § 206(d)(1) speaks. Guidry, 493 U.S. at 375.

Moreover, unlike § 409(a) which has never been authoritatively interpreted by this Court, § 206(d)(1) has been thoroughly analyzed. In particular, this Court concluded in Guidry, 493 U.S. at 376, that Congress surely had considered that the pensioner's liability might arise from bad acts, but nonetheless enacted a statute which

> reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

This reasoning also was reaffirmed in Patterson, where it was emphasized that, in Guidry, the Court had

"vigorously. . .enforced ERISA's prohibition on. . .the alienation of pension benefits," and declined "to recognize any implied exceptions to the broad statutory bar [of § 206(d)(1)]. Id. at 2247. The Court reaffirmed in Patterson that this same policy choice must be the controlling consideration, as it had been in Guidry, "notwithstanding strong equitable considerations to the contrary ... [which would have favored the recognition of] an implied exception to ERISA's anti-alienation provisions." And Patterson, it was further stressed that the Court had never "recognize[d] any exceptions to ERISA's anti-alienation provision. . . . Id. at 2250 (citation omitted). The equities in the present case are virtually identical to those in Guidry, decided before Patterson.

As noted above, the majority subtly recast the statutory interpretation issue into a matter of negative inference, rather than plain meaning, which became the foundation for its conclusion that § 409(a) is actually more specific than § 206(d)(1); viz: "Nothing in section 206(d)(1) suggests that Congress intended that provision to limit the remedies afforded to beneficiaries under section 409(a) or in any way to protect unscrupulous fiduciaries." (Pa 19)

However, in Guidry, 493 U.S. 365, this Court held that the language of the LMRDA remedial provision involved there, providing for the availability of "other appropriate relief," could not be found controlling in the face of "an express, specific congressional directive [in § 206 (d)(1)] that pension benefits not be subject to assignment or alienation." Id. at 375. The analogous language in § 409(a), i.e., "such other equitable or remedial relief as the court may deem appropriate,"

cannot be meaningfully distinguished from the LMRDA language at issue in Guidry.

Guidry also holds out that the proper reading of § 206(d)(1), in tandem with the broad language contained in a remedies provision much the same as § 409(a), was hardly, as the majority below contended, to construe the availability of a "broad range of options" as overriding a specific exemption. To the contrary, the reading of § 206(d)(1) mandated by Guidry is that "[this section of] ERISA governs the narrow question whether [a] judgment may be collected through a particular means. . . ." 493 U.S. at 376. It is simply impossible to emerge from a fair reading of Guidry with a conclusion other than that §206(d)(1) cannot be deemed "less specific" than § 409(a).

As alternative grounds for its opinion, the majority below also suggested that to rule in the breaching fiduciary's favor would lead to an "absurd consequence." (Pa 30) However, in Guidry, this Court was candid in acknowledging a "natural distaste for the result we reach here." But the Court nevertheless held in favor of the "malefactor" based upon the clarity of the statute. Id. Fundamentally the difference in results between Guidry where the inquiry was devoted to the text of the statute, and the Third Circuit's disposition of this case, is that the court below started with its visceral reaction, and ended with its visceral reaction.

Granting that the result Coar urges is viscerally unappealing "in this case. . .," or, to use adjectives suggested or employed both by the district court below, Coar, 792 F.Supp. at 345, and this Court in Guidry, 493 U.S. at 376, "distasteful" and "unpalatable." However such a result is hardly "absurd." It is clearly not so

bizarre and egregious that it could not even have been contemplated as a possible outcome under the statute. Just as clearly it is not an outcome unequivocally at war with the congressional policy of the statutory provision which gave it birth. Quite to the contrary, it is precisely the type of troubling outcome that Guidry found Congress had considered and accepted as a possibility, involving a legislative trade-off, based on a judgment that is was worth the price of enduring such outcomes on occasion in order to achieve other objectives of the ERISA statutory scheme. In speaking to this issue, the Court emphasized Guidry, that in every instance in which § 206(d)(1) or the like is invoked by a debtor,

> [s]uch a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended only on the basis that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be 'especially' inequitable. The impracticality of defining such a standard reinforces our conclusion that the identification of any such exception should be left to Congress.

493 U.S. at 376-377.

The result sought by Coar, though it may provoke "a natural distaste," Id. at 377, is hardly at odds with the policy embodied in § 206(d)(1). Instead, while such a result bespeaks the difficulty of the "considered policy choice" Congress made, the essence of that choice was an acceptance of the possibility that in some cases it might serve to shield someone from paying for his "criminal misconduct," and could "prevent others from securing relief for wrongs done them." Without this recognition no choice woud have been involved. Accordingly the outcome petitioner urges is perfectly in harmony with the overriding policy consideration, and a faithful relection of Congress's choice in enacting § 206(d)(1), ". . .to safeguard a stream of income for pensioners (and their dependents. . .), even if that decision prevents others from securing relief for the wrongs done them." Id. at 376. That at times this choice may operate at cross-purposes with, or frustrate another general objective served by, another provision of ERISA, or another federal remedial provision - i.e., to effectuate whatever rights to a remedy such a provision generally alludes to - is legally irrelevant. Congress obviously considered this in enacting § 206(d)(1) and decided to protect equally, and without distinction, the pensions of scoundrels, and the honest, but woebegone.

Tellingly, even the decision of the majority below implied some acknowledgement that the doctrine it adopted would not produce in every case a result which clearly would best serve the general design of ERISA. The most it offers is that

> [to permit] a set-off in this case best implements Congress's purpose to guarantee beneficiaries the broadest protection possi-

> ble against fiduciaries who breach their fiduciary duties to a pension fund and thereby cause it losses.

(Pa31) (Emphasis added.)[4]

Although the majority decision below must be read as a straight-out answer to the question posed but unanswered in Guidry, it is clear from the opinion itself that its formulation was entirely driven by ad hoc considerations, namely reluctance to allow "an individual such as Coar to collect pension benefits prior to satisfying his liabilities to the fund." (Pa 29) This creates an inherent tension in the decision between the statement of doctrine and its implications, reflected most clearly in n. 13 of the court's opinion:

> We recognize that it is possible that a pension fund might in circumstances which are arguably premature set off benefits such as when it claims nothing more than that a trustee made an unwise investment and the trustee disputes that claim.

(Pa 31, n. 13) (emphasis added.)

The characterization in the footnote of the

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[4]In contrast, the district court recognized that although "in this case" upholding the primacy of § 206(d)(1) would produce a difficult result, the overriding policy considerations had to remain the same in all cases and demanded uniform application of anti-alienation statute (Pa 58).

"problem" being that allowing a set-off in these circumstances might be "premature" is plainly a disingenuous attempt to deflect attention from the fact the court on some level was recognizing that it had made a choice, one which might imply or portended a series of harsh and "unpalatable" outcomes in other cases, in spite of the visceral satisfaction that choice afforded here. Obviously the real disquieting element in the "unwise investment" scenario, is that, unlike Coar's case, it might be far less "equitable," even "unpalatable" in some instances, to allow a fund to set- off an ERISA fiduciary liability against benefits. Whether or not it would be premature is totally beside the point. Delaying the pension fund's ability to begin making a set-off, i.e., until there is an actual money judgment mitigates the impact only for as long as it takes to get a judgment. The final result is the same - a lost pension.

One must therefore detect in this footnote an acknowledgement by the majority below that, although it portrayed its decision as a textually-compelled, straight-out answer to the question posed but unanswered in Guidry, it was actually driven to reject the result reached by the district court almost entirely by the disturbing specter of allowing "an individual such as Coar to collect pension benefits . . . ." (Pa 29), rather than any firm conviction regarding the interplay of the language between § 409(a) and § 206(d)(1).

On the other hand, Judge Becker in his concurring opinion was not burdened by any apparent need to disguise his reasoning. He dismissed the majority's textual analysis as nothing more than window-dressing to support a result based entirely upon a distaste for the outcome a fair reading of statutory provision compelled, and conceded that the petitioner's reading of the statutes was essen-

tially correct. His opinion is noteworthy for his candor in stating essentially that the only reason he was concurring in the result was that he too found the contrary outcome unpalatable, and the issue had yet to be resolved by this Court (Pa 34).

Plainly all members of the court below failed to heed the admonitions of this Court in Guidry, and fell prey to "the desire to do equity between particular parties. . ." and the temptation to "refuse enforcement [of a clear Congressional policy whenever] enforcement appears inequitable." All succumbed to the temptation "to carve out an exception," based upon "particular circumstances [in which it seems enforcement of the rule of the statute]. . .would be "especially" inequitable." The resulting exception not only "swallows the rule," it also itself promises a host of "unpalatable results" in future cases where equities may be startlingly different or even reversed. Id. at 376-377. As Guidry counselled, "[t]he impracticality of defining such a standard reinforces our conclusion that the identification of any such exception should be left to Congress." Id. at 377.

CONCLUSION

For all of the foregoing reasons, under Rule 10.1(a) the Petition for a Writ of Certiorari should be granted to resolve the conflict between the Third Circuit and District of Columbia Circuit on the one hand and the Fifth Circuit on the other as to the important question under ERISA left open by this Court in Guidry, 493 U.S. at 373, as to whether the remedial provisions of § 409(a) of ERISA do supersede, or create an exception to the "anti-alienation" policy of ERISA, embodied in § 206(d)(1).

Respectfully submitted,
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July 7, 1993

APPENDIX

Filed April 15, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5356, 92-5359, 92-5438, 92-5439

ROBERT J. COAR

v.

JOSEPH KAZIMIR, ROCCO MORONGELLO, WILLIAM LEVINE, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; DONATO DeSANTI, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; ROBERT DUDIK, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; PENSION FUND-MID JERSEY TRUCKING INDUSTRY LOCAL 701

Joseph Kazimir, Rocco Morongello, William Levine, Donato DeSanti and Robert Dudik, in their capacity as Trustees of the Pension Fund - Mid-Jersey Trucking Industry - Local 701 and the Pension Fund - Mid Trucking Industry - Local 701,
Appellants in Nos. 92-5356 and 92-5438

ROBERT J. COAR

v.

JOSEPH KAZIMIR, ROCCO MORONGELLO, in their

Trucking Industry-Local 701; WILLIAM LEVINE, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; DONATO DeSANTI, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; ROBERT DUDIK, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; PENSION FUND-MID JERSEY LOCAL 701

Robert Coar,
Appellant in Nos. 92-5359 and 92-5439

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 91-3116)

Argued March 9, 1993

BEFORE: BECKER, GREENBERG, and WEIS, Circuit Judges

(Filed: April 15, 1993)

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OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. Factual and Procedural Background

Defendants Joseph Kazimir, Rocco Morongello, William Levine, Donato DeSanti, and Robert Dudik, as trustees of the Pension Fund of Mid-Jersey Trucking Local 701 (the Pension Fund), and the Pension Fund itself, together called the "Fund Defendants," appeal from the district court's order of June 23, 1992, granting summary judgment to plaintiff Robert J. Coar, a former trustee and a beneficiary of the Pension Fund, in his suit seeking a declaration that the Pension Fund's actions in withholding his vested pension benefits and applying them as a set-off to his liability to the fund violated the anti-alienation provision of the Employee Retirement

Income Security Act of 1974 (ERISA), section 206(d)(1), 29 U.S.C. § 1056(d)(1). Coar cross-appeals from the district court's denial of his motion for an award of attorney's fees. Because we conclude that Coar cannot invoke ERISA's anti-alienation provision to shield his benefits from liability for breach of his duty to the Pension Fund, we will reverse the district court's grant of summary judgment and dismiss his appeal of the district court's order denying attorney's fees as moot.

The undisputed facts are as follows. In 1986, Coar, a former trustee, and current participant, of the Pension Fund was convicted, along with Frank Scotto, his co-trustee, and Kenneth Zauber, the general counsel to the Pension Fund, of engaging in a RICO conspiracy to receive kickbacks in exchange for channeling $20 million from the Pension Fund's assets to Omni Funding Group, a Florida-based mortgage company.[1] See United States v. Zauber, 857 F.2d 137, 140, 149-53 (3d Cir. 1988), cert. denied, 489 U.S. 1066, 109 S.Ct. 1340 (1989). In October 1984, prior to the indictment, the Pension Fund and its trustees had filed a civil case against Coar, his co-conspirators, and certain other defendants, alleging ERISA and RICO violations arising from the Omni investment. On September 13, 1990, the district court in the civil case granted summary judgment on liability to the Pension Fund and the trustees against Coar and certain of the other defendants.

Pursuant to its Findings of Fact and Conclusions

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[1]Coar's conviction was affirmed on appeal, and he served 18 months in prison.

of Law Concerning Damages in the fund's civil case, the district court ultimately entered a final, unappealed judgment against Coar for $25,535,887 for fiduciary duty violations under ERISA sections 409(a) and 502(a)(3), and a judgment for $96,607,661 for RICO violations. The district court explained that the $25,535,887 figure represented the difference between what the Pension Fund recovered on its investment with Omni, or received from settlements in litigation to recover its assets, and what it would have earned "had those monies continued to be invested with the Pension fund's other investment managers." On April 16, 1991, prior to the entry of final judgment against Coar, but after the district court found Coar liable, the Pension Fund advised Coar that it would set off Coar's liability to the Pension Fund against his benefits from the fund, beginning with the May 1991 benefits.[2]

On July 17, 1991, Coar filed this action against the Fund to obtain his benefits relying on section 502(a)(1) of ERISA, 29 U.S.C. §1132(a)(1). Coar claimed that the Pension Fund's withholding of benefits violated the non-forfeiture and anti-alienation provisions of ERISA, sections 203(a) and 206(d)(1), 29 U.S.C. §§ 1053(a) and 1056(d)(1). The Fund Defendants answered and filed a

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[2]We understand from the Fund Defendant's representations at oral argument that this case concerns only the monthly benefits due Coar during his lifetime, because the Fund Defendants take the position that they may not set off their claim against any benefits due Coar's survivors.

counterclaim seeking a declaratory judgment that the Pension Fund's withholding of benefits under sections 409(a) and 502(a)(3) of ERISA, 29 U.S.C. §§ 1109(a) and 1132(a)(3), did not violate ERISA's non-forfeiture and anti-alienation provisions. The parties each subsequently moved for summary judgment.

On May 12, 1992, the district court filed an opinion holding that, although the non-forfeiture provision of ERISA did not bar the set-off, the anti-alienation provision forbade an equitable set-off by the Pension Fund of its damages against Coar. See Coar v. Kazimir, 792 F. Supp. 345 (D.N.J. 1992). While the district court recognized that the Supreme Court's holding in Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 110 S.Ct. 680 (1990), expressly left open the issue of whether section 206(d)(1) of ERISA forecloses a pension fund from setting off benefits to a beneficiary who breached a fiduciary duty to the fund, it nevertheless found that Guidry's "reasoning [counseled] a strict application of the anti-alienation provision" precluding a set-off by the Pension Fund in this case. Id. at 351. Accordingly, the district court denied the Fund Defendants' motion for summary judgment and granted summary judgment to Coar. Id. The court also awarded Coar attorney's fees under section 502(g)(1) of ERISA, 29 U.S.C. §1132(g)(1), with the amount to be fixed after an affidavit of services was filed. Id. at n.11.

On May 20, 1992, pursuant to Fed. R. Civ. P. 59, the Fund Defendants moved for reconsideration of the summary judgment decision and the attorney's fees

award.[3] In an order entered June 23, 1992, the district court reaffirmed the summary judgment for Coar but, on reconsideration, denied an award of fees. The district court then entered judgment for Coar on June 23, 1992.

On June 29 and July 8, 1992, the Fund Defendants and Coar respectively filed notices of appeal and cross-appeal from the order of June 23, 1992. Coar filed his cross-appeal notwithstanding his prior filing, on July 2, 1992, of a motion in the district court, pursuant to Rule 59(e), to have the court reconsider its denial of his request for attorney's fees. The district court denied Coar's motion for reconsideration on July 31, 1992. On August 5 and August 11, 1992, the Fund Defendants and Coar respectively filed second notices of appeal and cross-appeal. On August 13, 1992, we consolidated all four appeals.

II. JURISDICTION

We have jurisdiction pursuant to 28 U.S.C. § 1291. The district court had subject matter jurisdiction pursuant to 29 U.S.C. § 1132(e) (ERISA) and 28 U.S.C. § 1331. We further note that our appellate jurisdiction over the Fund Defendants' first appeal from the summary judgment was not terminated when Coar served his timely motion pursuant to Fed. R. Civ. P. 59(e), notwith-

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[3]While the Fund Defendants also moved for relief under Fed. R. Civ. P. 60, the court held that its motion should be considered under Rule 59.

standing Fed. R. App. P. 4(a)(4) which provides that "[a] notice of appeal filed before the disposition of [such motion] shall have no effect." In this case, Rule 4(a)(4) does not impair our jurisdiction inasmuch as Coar's Rule 59(e) motion related exclusively to the district court's denial of attorney's fees, and did not concern the merits of the final judgment of the district court. See Buchanan v. Starships, Inc, 485 U.S. 265, 268-69, 108 S.Ct. 1130, 1132 (1988). Furthermore, though Coar's first notice of cross-appeal was ineffective because it was filed while his motion for reconsideration was pending, we nevertheless have jurisdiction over his cross-appeal because he filed a timely second notice of cross-appeal following the district court's denial of his motion for reconsideration.

III. STANDARD OF REVIEW

We exercise plenary review of the order granting summary judgment to Coar and denying it to the Fund Defendants. In most cases an appellate court reversing an order granting summary judgment will not direct the district court to enter judgment in favor of the appellant, because a genuine issue of fact will remain. Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242, 1250 (3d Cir. 1992); First Nat'l Bank v. Lincoln National Life Ins. Co., 824 F.2d 277, 281 (3d Cir. 1987). However, when the appeal concerns only issues of law, and there are no material facts in dispute as in this case, we are free to enter an order directing entry of summary judgment in favor of the appellant. Kreimer, 958 F.2d at 1250; Nazay v. Miller, 949 F.2d 1323, 1328

(3d Cir. 1991); First Nat'l Bank, 824 F.2d at 281.

IV. DISCUSSION

In enacting ERISA, Congress established a comprehensive remedial scheme for the protection of:

> the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans,and by providing for appropriate remedIes, sanctions, and ready access to the Federal courts.

ERISA § 2(b), 29 U.S.C. § 1001(b).

Section 409(a) of ERISA, mandates that a person breaching duties to a pension plan "shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. § 1109(a). Section 502(a) in turn authorizes the Secretary of Labor and any plan participant, beneficiary, or fiduciary to bring a civil action "for appropriate relief under section [409]" or to obtain an injunction or "other appropriate equitable relief" to redress a fiduciary violation. 29 U.S.C. § 1132(a).

However, ERISA's anti-alienation provision, section 206(d)(1), requires, "Each pension plan shall provide that benefits provided under the plan may not

be assigned or alienated."[4] 29 U.S.C. § 1056(d)(1). Coar argues that this provision prevents the Pension Fund from setting off his benefits pursuant to section 409(a). Thus, he contends that the issue before us is whether section 409(a) overrides section 206(d)(1).[5]

We start our analysis with the Supreme Court's opinion in Guidry. Guidry, the chief executive officer of a union and the trustee of its pension plans, pled guilty to embezzling funds from the union. The union subsequently brought a civil action in which Guidry was found liable. In formulating a remedy, the district court imposed a constructive trust on Guidry's pension benefits and the court of appeals affirmed, in reliance on section 409(a) of ERISA. The Supreme Court reversed.

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[4]Express exceptions to this provision allow assignment for a "qualified domestic relations order" and "a voluntary and revocable assignment of not to exceed 10 percent of any benefit payment." 29 U.S.C. § 1056(d)(2), (3).

[5]Coar does not dispute that he was a fiduciary who owed a duty to the Pension Fund, nor does he deny that he breached that duty. Furthermore, Coar does not contend that the anti-alienation provision of the Pension Fund plan was broader than required by section 206(d)(1) and he does not seek to uphold the judgment by contending that the district court erred in its holding with regard to the anti-forfeiture provision. Section 203(a) of ERISA, 29 U.S.C. § 1053(a) ("each pension plan shall provide that an employee's right to his normal retirement income is nonforfeitable upon the attainment of normal retirement age . . . ").

The Court stated that because the union and pension plans were distinct legal entities and Guidry was found liable only for his breach of duty to the union, "[w]e need not decide whether the remedial provisions contained in § 409(a) supersede the bar on alienation in § 206(d)(1), since [Guidry] has not been found to have breached any fraudulent duty to the pension plans." 110 S.Ct. at 685 (emphasis in original). Thus, the Court held that "the Court of Appeals erred in invoking § 409(a)'s remedial provisions." 110 S.Ct. at 686. The union, recognizing that section 409(a) could not serve as the basis for the set-off in the absence of a breach of duty owed to the pension plan, instead relied on the remedial provisions of the Labor-Management Reporting and Disclosure Act (LMRDA). Section 501(a) of the LMRDA states that a union's officers "occupy positions of trust in relation to such organization and its members as a group" and therefore have a duty "to hold its money and property solely for the benefit of the organization and its members." 29 U.S.C. § 501(a). Section 501(b) creates a private right of action for union members "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." 29 U.S.C. § 501(b). The union argued that this provision authorized the imposition of a constructive trust which supersedes ERISA's prohibition on the alienation of pension benefits. 110 S.Ct. at 686.

In rejecting this argument, the Court stated that "[i]t is an elementary tenet of statutory construction that '[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general

one . . . .'" 110 S.Ct. at 687 (quoting Morton v. Mancari, 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2483 (1974)). The Court therefore did "not believe that congressional intent would be effectuated by reading the LMRDA's general reference to 'other appropriate relief' as overriding an express, specific congressional directive [in ERISA] that pension benefits not be subject to assignment or alienation." Id. Rather, it reconciled the two statutes by holding that "the LMRDA determined what sort of judgment the aggrieved party may obtain," while ERISA's section 206(d)(1) related only to "the narrow question of whether that judgment may be collected through a particular means -- a constructive trust placed on the pension." 110 S.Ct. at 687 (emphasis in original).

The Court also declined to accept the union's position that equitable principles might support the establishment of the constructive trust:

> Nor do we think it appropriate to approve any generalized equitable exception--either for employee malfeasance or for criminal misconduct--to ERISA's prohibition on the assignment or alienation of pension benefits. Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done to them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

Id. at 687.

The Court predicated its holding in this regard on its treatment of section 206(d)(1) as an antigarnishment provision and its view of the constructive trust imposed by the district court as a form of garnishment. Furthermore, the Court thought that an equitable exception would eviscerate the provision for it would be difficult to refuse to recognize other exceptions, as courts almost always would think it equitable to garnish the benefits of a wrongdoer on behalf of an innocent creditor. The Court explained:

> As a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text. The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended only on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether

> application of the rule in particular circumstances would be 'especially' inequitable. The impracticability of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress.

110 S.Ct. at 687 (emphasis in original).

The few cases, both before and after Guidry, considering the relationship between section 409(a) and section 206(d)(1) have come to conflicting results. Before Guidry the Court of Appeals for the District of Columbia Circuit held that the rule against alienation was not "immutable" where a plan trustee breached his fiduciary duty to the plan. Crawford v. La Boucherie Bernard Ltd., 815 F.2d 117 (D.C. Cir. 1987), cert. denied, 484 U.S. 943, 108 S.Ct. 328 (1988). In reaching this conclusion, the court turned first to the language in section 409(a), finding it to have given courts "broad authority . . . to fashion remedies redressing any breach and for protecting the interests of participants and beneficiaries." Id. at 119. Crawford also relied on ERISA's legislative history, which indicated that ERISA's remedial provisions were intended to "make applicable the law of trusts; . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger trust assets." Id. at 120 (citing 120 Cong. Rec. S-15737, Aug. 22, 1974, reprinted in 1974 U.S.C.C.A.N. 4639, 5177, 5186). Having determined from the legislative history that the common law of trusts applied, the court then cited the well-established principle that when a trustee who also is a beneficiary of the trust breaches

his fiduciary duty to the trust, the other beneficiaries can force the trustee to make good his breach from his beneficial interest in the trust. 815 F.2d at 120 (citing Bogert, Trusts & Trustees, § 191 at 484 (2d. ed. 1979); III Scott on Trusts § 257, at 2201 (3d ed. 1967)).

Finally, the Crawford court relied on several cases which had recognized exceptions to section 206(d)(1) based on equitable principles. For example, it noted that the Court of Appeals for the Eleventh Circuit had excepted from section 206(d)(1)'s reach liabilities arising from the employee's criminal conduct towards his employer, see St. Paul Fire & Marine Ins. Co. v. Cox, 752 F.2d 550, 552 (11th Cir. 1985), and that other cases had permitted garnishment of benefits to satisfy family support and community property obligations. See, e.g., AT & T v. Merry, 592 F.2d 118 (2d Cir. 1979); Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), aff'd, 632 F.2d 740 (9th Cir. 1980), cert. denied, 453 U.S. 922, 101 S.Ct. 3158 (1981).

After Guidry, a district court agreed with Crawford that section 409(a) authorizes a set-off notwithstanding section 206(d)(1). Pension Benefit Guar. Corp. v. Solmsen, 743 F. Supp. 125 (E.D.N.Y. 1990).[6] In Solmsen a trustee/beneficiary was found liable to the fund for failing to forward employee and employer contributions to the plan. In formulating a remedy, the district court ordered a set-off of the trustee's benefits.

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[6]Further post-Guidry support for this result also may be found in New Jersey v. Pulasty, 612 A.2d 952 (N.J. Super. Ct. App. Div. 1992).

In so doing, the court cited Crawford for the proposition that "[t]he remedy of set-off in fiduciary breach cases has been recognized as a narrow exception to the anti-alienation provision." Id. at 129. The court commented further:

> ERISA's legislative history and common sense suggest that set off is permissible. No good reason appears as to why [the plan] should have to pay benefits to a person who has wronged the Plan, and the beneficiaries of it, before he made good the wrong.

Id.

The court also concluded that Guidry did not compel a contrary result given the Supreme Court's express refusal to decide whether a fund could set off from pension payments its claim against a beneficiary. Although the Solmsen court did not discuss the language in Guidry regarding the undesirability of creating an equitable exception to section 409(a), it evidently did not consider that language directed to a circumstance in which the trustee/beneficiary was liable to the fund.

However, unlike the Solmsen court, the United States Court of Appeals for the Fifth Circuit, predicted that "[b]ased upon Guidry's strict application of the anti-alienation provision" the Supreme Court would not find the language in section 409(a) expansive enough to supersede the anti-alienation provision. Herberger v. Shanbaum, 897 F.2d 801, 804 (5th Cir.) cert. denied, 498 U.S. 817, 111 S.Ct. 60 (1990). That court thus declined to follow Crawford as it considered that Guidry had

undermined much of the reasoning in Crawford. Id. In particular, Herberger found Crawford's reliance on ERISA's legislative history no longer to be persuasive, given that Guidry found no justification to create an exception to the anti-alienation provision. Herberger deduced that if the Supreme Court believed that the legislative history warranted an equitable exception to the anti-alienation provision, it would have said as much.

Herberger also observed that the Supreme Court in Guidry rejected holdings in some of the cases relied on by Crawford to support the proposition that the anti-alienation provision is not "immutable." For example, Guidry stated that an employee's criminal misconduct cannot be the basis for a set-off, which is contrary to the holding in St. Paul Fire & Marine, upon which Crawford relied. In addition, Guidry recognized that "qualified domestic relations orders" now are authorized by an express statutory anti-alienation exception. Therefore, in the Herberger court's view, the domestic relations cases cited by Crawford no longer supported the Crawford court's decision to create a judicial exception to the anti-alienation provision. "To the contrary, the fact that Congress amended the statute to allow this exception lends support to the notion that Congress will create exceptions where it sees fit and courts should not do so." 897 F.2d at 804.

In the case before us, the district court agreed with Herberger that Guidry's discussion of the anti-alienation provision essentially had overruled Crawford, suggesting that the provision was indeed immutable.

First, the district court observed that LMRDA section 501(b) ("or other appropriate relief") was similar to ERISA's section 409(a)("and shall be subject to such other equitable or remedial relief as the court may deem appropriate"). 792 F. Supp. at 349. The district court inferred from this similarity that if the Supreme Court did not find LMRDA's language expansive enough to supersede the anti-alienation provision, it would be unlikely to find section 409(a)'s language sufficient either. Second, the district court felt bound by the Supreme Court's declaration that in passing the anti-alienation provision Congress had made a considered and clear decision to safeguard pension rights. In this regard, the district court, closely tracking Herberger, cited the amendment to ERISA excepting certain domestic relations orders from the anti-alienation provision as evidence that Congress will create policy-oriented exceptions where appropriate. The court found its refusal thus far to do so in cases of the type before us leads to a negative inference. Id. at 350. The court, therefore, declared that "despite the natural distaste for permitting a beneficiary who has wronged the pension fund to collect benefits, a legislative policy determination has been made and the statute . . . is clear." Id. at 351.

We decline to follow this reasoning because we think it construes Guidry's holding too broadly and places insufficient emphasis on the wording of sections 409(a) and 206(d)(1) and ERISA's legislative history. This case fundamentally differs from Guidry for here, unlike the Supreme Court in Guidry, we are analyzing

two provisions in the same statute. We therefore are obliged to reconcile these provisions and to apply both without undermining either's purpose for, "In interpreting language in one section of a statute in conjunction with language of other sections, [a] court strives to find a reading that is consistent with the purposes of the entire statute considered as a whole." Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410, 1416 n.15 (9th Cir. 1990).

Nothing in section 206(d)(1) suggests that Congress intended that provision to limit the remedies afforded to beneficiaries under section 409(a) or in any way to protect unscrupulous fiduciaries. Neither does the legislative history of section 206(d)(1), which courts have described as "sparse," Ellis Nat'l Bank v. Irving Trust Co., 786 F.2d 466, 470 (2d Cir. 1986), and inconclusive, General Motors Corp. v. Buha, 623 F.2d 455, 460 (6th Cir. 1980), indicate that a dishonest trustee should be shielded from the consequences of a breach of fiduciary duty. On the contrary, the "only available [legislative] history," Northwest Airlines, Inc. v. Roemer, 603 F. Supp. 7, 9 (D. Minn. 1984), states that the objective of the provision was "[t]o further ensure that the employee's accrued benefits are actually available for retirement purposes . . . ." H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4734. If, as indicated by the legislative history, the anti-alienation provision is intended "to protect plan beneficiaries by ensuring that plan assets are used only for payment of benefits" we think that Congress's purpose "would be undermined, not advanced, by an

interpretation that prohibited offset under these circumstances," because the Pension Fund's assets would be dissipated further through payments to those who had looted the fund rather than being preserved for the beneficiaries' use. Crawford, 815 F.2d at 122.

We note further that Guidry did not state that section 206(d)(1) is immutable. Rather, the Court's main reason for not overriding the anti-alienation provision through the LMRDA was that the LMRDA's provision was general whereas the anti-alienation provision in ERISA was specific. This reasoning, however, does not support the district court's conclusion in this case, and actually suggests the opposite result, because section 409(a) is more specific than both the anti-alienation provision in ERISA and the LMRDA provision. Section 409(a) expressly states that the trustee who violates a fiduciary duty to the plan must make good to the plan. It therefore imposes a specific obligation upon the trustee to return misappropriated assets to the beneficiaries. Section 409(a) also directs the courts to ensure that the wayward trustee fulfills this obligation to make restitution through whatever remedy the court deems appropriate in the circumstances ("such other equitable or remedial relief as the court might deem appropriate"). In contrast, the anti-alienation provision speaks only in the most general terms.

Consequently, under Guidry's reasoning, the more specific language of section 409(a) serves as a better indicator of congressional intent than the general language of section 206(d)(1). Thus, section 409(a) should "not be controlled or nullified" by the anti-

alienation provision. See also Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tompkins Co., 322 U.S. 102, 64 S.Ct. 890 (1944) (applying rule that when a specific and general provision conflict, the specific terms and language prevail); Gallenstein v. United States, 975 F.2d 286, 290 (6th Cir. 1992) (holding that when construing a general enactment and a more particular enactment within the same statute, and when the plain language of the two subsections cannot be otherwise reconciled, the more specific subsection should be given effect); Markair, Inc. v. Civil Aeronautics Bd., 744 F.2d 1383, 1385 (9th Cir. 1984) (reciting "the well-settled rule of statutory construction that specific terms of a statute override the general terms").

Therefore, given section 409(a)'s express mandate that trustees undo any harm they have done to the pension plan, and the absence of any language in section 206(d)(1) or its legislative history limiting the range of options granted to the courts under ERISA to see that this is done, we do not believe that Congress intended the anti-alienation provision to dilute the potential relief available to pension beneficiaries. Instead, we read section 206(d)(1) and, by extension Guidry, as shielding only the beneficiaries' interest under the pension plan from third-party creditors.

We also find it significant that the legislative history to section 206(d)(1) speaks of "a garnishment or levy," H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5061, and that Guidry, as we have indicated, refers to section 206(d)(1) as an "anti-garnishment provision." Garnish-

ment connotes a triangular relationship among a debtor, creditor, and third party, in which the creditor levies on some asset owed to the debtor by a third party. See, e.g., Western v. Hodgson, 494 F.2d 379, 382-83 (4th Cir. 1974) (finding that "[u]nder most State statutes, the term 'garnishment' denotes a proceeding whereby a plaintiff seeks to subject to his claim property of the defendant in the hands of a third person, or money owed by a third person to the defendant") (emphasis added); Atwater v. Roudebush, 452 F. Supp. 622, 631 (N.D. Ill. 1976) (distinguishing between set-off and garnishment); Black's Law Dictionary 680 (6th ed. 1990) (defining garnishment as "[a] proceeding whereby a plaintiff creditor, i.e., garnishor seeks to subject to his or her claim the property or money of a third party, i.e., garnishee, owed by such party to defendant debtor, i.e., principal defendant"); 7 C.J.S. Attachment § 2 (1980) ("Generally speaking, garnishment is but a form of attachment .... However, attachment and garnishment differ in character in that attachment is directed against property of the principal defendant which is his possession or under his control, while the object of garnishment is to reach an indebtedness due to the principal defendant by a third person, or property in the possession or control of a third person, which belongs to the principal defendant.") (emphasis added)).[7]

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[7]Contrary to Coar's argument, Patterson v. Shumate, 112 S.Ct. 2242 (1992), does not suggest an opposite interpretation of Guidry. It is true that the Court in

(continued...)

Courts therefore usually would not understand "garnishment" as meaning a set-off of a trustee's benefits by a pension plan itself. For this reason, we believe that Congress and the Supreme Court intended that the term "garnishment" have its usual meaning as an action taken against an asset by a third-party creditor, and not as an action taken by a creditor itself to set off its own

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[7](...continued)
Patterson stated that "this Court itself vigorously has enforced ERISA's prohibition on the assignment or alienation of pension benefits, declining to recognize any implied exceptions to" section 206(d)(1). 112 S.Ct. at 2247 (citing to Guidry). Further, the Court also declared, "We have previously declined to recognize any exceptions to ERISA's anti-alienation provision outside the bankruptcy context." Id. at 2250 (citing to Guidry)(emphasis in original). But, again as with Guidry, Patterson did not deal with a trustee who breached a fiduciary duty to the pension fund. Instead, it concerned a claim by a bankruptcy trustee who sought to have the debtor's pension benefits paid to the estate rather than to the debtor himself. Section 541(c)(2) of the Bankruptcy Code provides that a restriction on the transfer of a beneficial interest of a debtor in a trust enforceable under nonbankruptcy law is enforceable in a bankruptcy proceeding. 11 U.S.C. § 541(c)(2). The bankruptcy trustee argued that "non-bankruptcy law" only referred to state law and not to trusts governed by ERISA. The Court disagreed and further held that the anti-alienation provisions of section 206(d)(1) of ERISA satisfied the literal terms of section 541(c)(2) of the Bankruptcy Code. Thus, the debtor's interest in the ERISA plan was excluded from the estate.

obligation against a debt due it. This construction is supported by AT & T v. Merry, 592 F.2d at 124, which indicated that the purpose of section 206(d)(1) "is to protect an employee from his own financial imprudence in dealings with third parties."

The controlling "anti-alienation" regulations issued by the Internal Revenue Service and relied on by Guidry, 110 S.Ct. at 685 n.10 (quoting 26 C.F.R. § 1.401(a)-13(b)(1) (1989)), further clarify this distinction between a set-off of benefits by the plan and a garnishment of benefits by an outsider. The regulations define alienation or garnishment as "[a]ny arrangement providing for the payment to the employer of plan benefits which otherwise would be due to the participant under the plan," or "whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, . . . a plan benefit payment." See 26 C.F.R. § 1.401(a)-13(c)(1) (1992) (emphasis added). Furthermore, they specifically exclude from ERISA's anti-alienation bar actions by the pension plan itself to apply or set off vested pension benefits to recover debts owed by the participant to the plan as a result of a prior overpayment of benefits or as a result of the failure by a participant to repay a debt to the plan. See 26 C.F.R. §§1.401(a)-13(c)(2)(iii) and (d)(2) (1992). Hence, the regulations clearly comprehend "garnishment" or "alienation" as referring to actions by third parties, such as a beneficiary's employer or creditors, and not as recoupment by the pension plan.[8]

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[8]The regulations do treat a voluntary assignment to (continued...)

The fact is that under the construction in the IRS regulations of the anti-alienation provision we are not even concerned with section 409(a), for when the Pension Fund, without Coar's consent, set off the benefits due to him against his debt to it there was simply not an alienation within section 206(d)(1).[9] Indeed, it seems to us that a court would have to stretch section 206(d)(1), which merely requires that the plan provide that benefits "not be assigned or alienated," to encompass a set-off which in the context of this case was nothing more than the Pension Fund's refusal to make payments.

We note also that from a policy point of view our reading of section 206(d)(1), as barring only the alienation of benefits to third parties, is not inconsistent with the Supreme Court's concern in Guidry against creating any equitable exceptions to an "anti-garnishment" rule. If the Supreme Court ruled otherwise, it would have invited all sorts of third-party claims against pension

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[8](...continued)
the plan as security for a loan from the plan as an alienation but we are not concerned with that provision in this case which, of course, deals with an involuntary set-off. 26 C.F.R. § 1.401(a)-13(d)(2) (1992).

[9]It seems to us that if section 206(d)(1) is not applicable, then as a matter of federal common law under ERISA, a concept we discuss below, a court would allow the set-off by following established trust law. As we indicated in footnote 8, supra, we are not concerned with whether a voluntary assignment is an alienation.

funds. Courts would have found it impossible to distinguish the equities of one claim from any other, and ultimately would have rendered the anti-garnishment provision nugatory. No such danger exists here. A holding that section 409(a) trumps the "anti-garnishment" rule in this case, which as we have explained is not even necessary to sustain the Fund Defendants' position, would create only one narrowly defined class of excepted claimants--namely, the fund and thus effectively the beneficiaries themselves, the very persons ERISA was designed to protect.[10] Such a holding certainly would not "approve any generalized equitable exception" to section 206(d)(1). Guidry, 110 S.Ct. at 687.

The legislative history discounted by Herberger also leads us to read Guidry as we do. The Herberger court stated that Guidry undermined the notion that the legislative history of ERISA supports the application of trust law to authorize a set-off through section 409(a).

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[10]The parties understandably do not focus on the distinction between the amounts Coar owes under the ERISA and RICO judgments. Neither will we because the description given by Coar of his limited assets and income convinces us that it would be unrealistic to anticipate that he ever will pay the $25,535,887 ERISA judgment. We acknowledge, however, that there might in theory be a distinction between the judgments to the extent that the set-off is justified by section 409(a). Of course, if the action of the fund in setting off Coar's benefits against his debt was not an alienation, then there would not even be a theoretical distinction between the two aspects of the judgment.

Yet, Guidry did nothing of the sort. Because Guidry did not concern a breach of duty to a trust, the Supreme Court had no reason to consider the traditional principle that a beneficiary and trustee who breaches a fiduciary duty to the trust may forfeit his or her benefits, and did not even mention the legislative history cited by Crawford. Moreover, the Supreme Court previously has read the legislative history of ERISA as requiring the application of traditional trust law in the administration of the statute, see Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110, 109 S.Ct. 948, 954 (1989), and has anticipated that "a federal common law of rights and obligations under ERISA-regulated plans would develop." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56, 107 S.Ct. 1549, 1559 (1987). Accord Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66, 107 S.Ct. 1542, 1547-48 (1987); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26, 103 S.Ct. 2841, 2854 n.26 (1983). Therefore, the legislative history relied on by Crawford continues to have relevance on the issue of whether section 409(a) authorizes a set-off of the benefits of a trustee who is liable to the fund.

In this regard, the Report of the Senate Committee on Labor and Public Welfare states:

> The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations . . . . The intent of the committee is to provide the full range of legal and equitable remedies available

in both state and federal courts.

S. Rep. No. 93-127, 93d Cong., 1st Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4838, 4871 (emphasis added).

Similarly, Senator Harrison A. Williams expressly stated that the congressional intent was for ERISA to codify the principles of traditional trust law:

> The objectives of these provisions are to make applicable the law of trusts; . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets, and to provide effective remedies for breaches of trust.

120 Cong. Rec. S-15737, Aug. 22, 1974, reprinted in 1974 U.S.C.C.A.N. 5177, 5186 (emphasis added).

Thus, permitting the set-off in this case would effectuate Congress's intent, by making available to the Pension Fund a common law remedy utilized in pre-ERISA days by state and federal courts for breaches of trust. See, e.g., In re Watson, 449 N.E.2d 1156 (Ind. Ct. App. 1983) (holding that successor trustee properly applied former trustee's undistributed income to satisfy prior judgment for improper distribution of trust corpus); In re Van Nostrand's Will, 29 N.Y.S.2d 857, 865 (N.Y. Sur. Ct. 1941) (placing equitable lien upon the beneficial interest of a trustee/beneficiary who had embezzled trust property to compensate wronged beneficiaries of the trust); In re Burr's Estate, 257 N.Y.S. 654 (N.Y. Sur. Ct. 1932) (holding that a trustee properly withheld trust payments owed to a prior trustee who had misappropriated trust funds), aff'd, 263 N.Y.S. 945

(N.Y. App. Div. 1933);[11] Restatement (Second) of Trusts § 257 (1959) ("If a trustee who is also one of the beneficiaries commits a breach of trust, the other beneficiaries are entitled to a charge upon his beneficial interest to secure their claims against him for the breach of trust, unless the settlor manifested a different intention.").

Considering that Congress stated that it wanted pre-ERISA trust law applied to ERISA's remedial provisions; that this pre-ERISA law provides for a set-off in the circumstances of our case; and that the remedial provision at issue, section 409(a), expressly requires the trustee breaching his or her fiduciary duty to make good to the plan, we believe that Congress did not intend to allow an individual such as Coar to collect pension benefits prior to satisfying his liabilities to the fund. Indeed, a contrary reading would permit dishonest trustees, such as Coar, "who repeatedly and indeed blatantly breached their fiduciary duties to the pension plan" to evade their obligations to the fund and would result in "[p]lan members and their families [having] to watch their pension monies disappear once again into the [dishonest trustees'] pockets." Crawford, 815 F.2d at

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[11]Interestingly, in reaching this conclusion, the Burr court held that a state law similar to section 206(d)(1) of ERISA, precluding the assignment of a beneficiary's interest, did not apply because "[i]t was not intended to protect a dishonest fiduciary in the retention of income otherwise payable to [the beneficiary] from the trust." 257 N.Y.S. at 657.

121.[12] We cannot understand how such a result would protect funds from being "dissipated" or "endangered." See also United States v. Huff, 873 F.2d 709, 713 (3d Cir. 1989) (refusing to construe sentencing guidelines "in a manner which may lead to an absurd consequence"); Government of Virgin Islands v. Berry, 604 F.2d 221, 225 (3d Cir. 1979) ("'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.'"(quoting United States v. Kirby, 74 U.S. (7 Wall.) 482, 486 (1868))).

Thus, construing section 206(d)(1) as limiting the remedies provided to beneficiaries by section 409(a) anomalously would deny beneficiaries of pension funds protection under ERISA that was available under prior law, an interpretation of ERISA which the Supreme Court has disfavored. See Firestone, 489 U.S. at 114, 109 S.Ct. at 956 (rejecting "reading of ERISA" which "would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted").

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[12]Coar emphasizes that in our opinion in his criminal appeal we found "no evidence that the government could or did show that the pension fund lost money, either from its corpus or Omni's guaranteed rate of return." United States v. Zauber, 857 F.2d at 144. However, the Pension Fund is not bound by the government's proofs at a criminal trial at which it was not a party. In its action against Coar, the Pension Fund established that it had actual losses under ERISA of $25,585,887.

Therefore permitting the set-off in this case best implements Congress's purpose to guarantee pension beneficiaries the broadest protection possible against fiduciaries who breach their fiduciary duties to a pension fund and thereby cause it losses.[13]

In seeking to avoid this result, Coar suggests that we should construe section 409(a) narrowly as creating only a cause of action without authorizing a method of recovery. In the first place, the language of the provision belies such an interpretation because it speaks of remedies as well as a pensioner's right to bring suit. In fact, the text implies that courts should apply whatever remedies seem equitable under the circumstances of a given case. More importantly, Coar's proffered construction leads only to fruitless question begging. Given this context, because Congress created a right, it probably intended to create a remedy. Thus, accepting Coar's suggested reading of section 409(a) would not solve our problem, but instead would place us in the same

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[13]We recognize that it is possible that a pension fund might in circumstances which arguably are premature set off benefits such as when it claims nothing more than that a trustee made an unwise investment and the trustee disputes that claim. We are, however, not concerned with that type of situation in this case, for the fund did not set off until after it obtained a summary judgment on liability so that it was obvious that Coar would be indebted to it under ERISA. Accordingly, we are not required to determine the earliest point at which a set-off is justifiable because whatever that point may be, it was passed in this case.

situation as at the beginning of our inquiry; namely, forcing us to ask again what remedy does section 409(a) authorize?

Likewise, unlike the district court and Coar, we do not attach significance to the fact that Congress has created some exceptions to section 206(d)(1), such as in the domestic relations context, see section 104(a) of ERISA, 29 U.S.C. § 1056(d) (creating exception to section 206's anti-alienation provision for qualified domestic relations orders), without creating an exception for the situation in this case. To start with, of course, inasmuch as a set-off is not an alienation, then the absence of an exception allowing a set-off to the restraint on alienation is meaningless. Furthermore, we do not find that Congress's failure to pass legislation to create an exception to section 206(d) that would cover this situation to be a persuasive indicator of its intent. The Supreme Court previously has admonished the lower courts not to read Congress's refusal to amend ERISA as necessarily indicative of a particular intent. "Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences may be drawn from such inaction.'" Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 110 S.Ct. 2668, 2678 (1990) (quoting United States v. Wise, 370 U.S. 405, 411, 82 S.Ct. 1354, 1359 (1962)). This is particularly true in our case where, as discussed above, our examination of other available statutory evidence compels the conclusion that Congress would not have intended to forbid a set-off.

V. CONCLUSION

We will reverse the order of June 23, 1992,

appealed at Docket No. 92-5356, and will remand the case to the district court for entry of judgment in favor of the Fund Defendants. We will dismiss the Fund Defendants' second appeal at Docket No. 92-5438 as both unnecessary and untimely. In view of our disposition, Coar's cross-appeals from the district court's denial of attorney's fees are moot, as he makes no contention that he is entitled to fees if the Fund Defendants are successful on the merits. See Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 675 (3d Cir. 1991), cert. denied, 112 S.Ct. 1668 (1992); Ingersoll-Rand Financial Corp. v. Anderson, 921 F.2d 497, 504 n.11 (3d Cir. 1990). Furthermore, his first cross-appeal at Docket No. 92-5359 was premature. Thus, we also will dismiss the cross-appeals at Docket Nos. 92-5359 and 92-5439.

BECKER, Circuit Judge, concurring.

I do not agree with the majority that the language of § 409(a) of ERISA, 29 U.S.C. 1109(a), is more specific (and hence serves as a better indication of Congressional intent) than the language of § 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1). The issue here is (involuntary) alienation, and in my view the statutory language dealing with alienation in § 206(d)(1) is more specific in that context than the language dealing with equitable remedies under § 409(a). In addition, with respect to

the language concerning a trustee's personal liability to rectify his or her breach of fiduciary liability in § 409(a), I find that language to be as equally general as the anti-alienation provision of § 206(d)(1). In my view, neither § 409(a) nor § 206(d)(1) can be accurately characterized as more specific than the other and therefore warranting greater interpretive authority.

I also do not agree with the majority that the language of § 206(d)(1), and by extension Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 110 S. Ct. 680 (1990), can fairly be read as shielding only the beneficiaries' interest under the pension plan from third-party creditors and not second-party creditors, namely the Fund itself. In my view, the plain meaning of "may not be assigned or alienated" in § 206(a)(1), appears to apply equally to involuntary alienation by the Fund itself and to involuntary alienation initiated by a garnishing third-party. In other words, the plain meaning of § 206(d)(1) seems to encompass both the involuntary alienation arising by reason of Coar's criminal fiduciary breach in the context of a claim by the Fund and a claim by a garnishing third party.

All that said, I nonetheless concur in the judgment. I do so because I recognize that the Supreme Court in Guidry expressly left open the question before us, see 493 U.S. at 373, 110 S. Ct. at 685, and, consistent with the observation of the majority opinion, see Majority Typescript at 18, I cannot conceive that Congress intended that someone in the position of Mr. Coar (in contrast to any of his survivors) should be able to receive pension benefits from the Fund he had so

extensively defrauded (at least until the amount taken was repaid). As Judge Nickerson observed, reaching the same conclusion, in a post-Guidry case, see Pension Benefit Guar. Corp. v. Solmsen, 743 F. Supp. 125 (E.D.N.Y. 1990), such a result would make no sense. See Sutherland, Statutory Construction § 363 (2d ed. 1904) (a statute should not be interpreted to create absurd results); accord Robert Winzinger, Inc. v. Management Recruiters of Bucks County, Inc., 841 F.2d 497, 500 (3d Cir. 1988). This result would be particularly counter-intuitive given that we are interpreting a statute, ERISA, the broad purpose of which is to protect and ensure the availability of pension funds for retirees. As the majority opinion acknowledges, to allow Coar to collect his pension from the very Fund he defrauded would detract from this overriding purpose of ERISA.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5356, 92-5359,
92-5438, 92-5439

ROBERT J. COAR
V.
JOSEPH KAZIMIR, ROCCO MORONGELLO, in their Capacity as Trustees of the Pensin Fund-Mid Jersey Trucking Industry Local 701; WILLIAM LEVINE, in hisapacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; DONATO DeSANTI, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; ROBERT DUDIK, in his capacity as Trustee as of the Pension Fund-Mid Jersey Trucking Industry-Local 701; PENSION FUND-MID JERSEY TRUCKING INDUSTRY LOCAL 701

Joseph Kazimir, Rocco Morongello, William Levine, Donato DeSanti and Robert Dudik, in their capacity as Trustees of the Pension Fund - Mid-Jersey Trucking Industry - Local 701 and the Pension Fund - Mid-Jersey Trucking Industry - Local 701,

Appellants in Nos. 92-5356 and 92-5438

ROBERT J. COAR

ROBERT J. COAR

V.

JOSEPH KAZIMIR, ROCCO MORONGELLO, in their Capacity as Trustees of the Pension Fund-Mid Jersey Trucking Industry-Local 701; WILLIAM LEVINE, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; DONATO DeSANTI, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; ROBERT DUDIK, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; PENSION FUND-MID JERSEY LOCAL 701

Robert Coar,
Appellant in Nos. 92-5359 and 92-5439

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 91-3116)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINGSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and WEIS, Circuit Judges

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The Petition for rehearing filed by the appellee-cross appellant Robert J. Coar in the above captioned

matters having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

/s/

Circuit Judge

Dated: May 11, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5356, 92-5359,
92-5438, 92-5439

ROBERT J. COAR
V.
JOSEPH KAZIMIR, ROCCO MORONGELLO, in their Capacity as Trustees of the Pensin Fund-Mid Jersey Trucking Industry Local 701; WILLIAM LEVINE, in his
capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; DONATO DeSANTI, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; ROBERT DUDIK, in his capacity as Trustee as of the Pension Fund-Mid Jersey Trucking Industry-Local 701; PENSION FUND-MID JERSEY TRUCKING INDUSTRY LOCAL 701

Joseph Kazimir, Rocco Morongello, William Levine, Donato DeSanti and Robert Dudik, in their capacity as Trustees of the Pension Fund - Mid-Jersey Trucking Industry - Local 701 and the Pension Fund - Mid-Jersey Trucking Industry - Local 701,

Appellants in Nos. 92-5356 and 92-5438

ROBERT J. COAR

V.

JOSEPH KAZIMIR, ROCCO MORONGELLO, in their Capacity as Trustees of the Pension Fund-Mid Jersey Trucking Industry-Local 701; WILLIAM LEVINE, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; DONATO DeSANTI, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; ROBERT DUDIK, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; PENSION FUND-MID JERSEY LOCAL 701

Robert Coar,
Appellant in Nos. 92-5359 and 92-5439

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 91-3116)

Present: Becker, Greenberg, and Weis, Circuit Judges

JUDGEMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel March 9, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 3, 1992, be, and the same is hereby appealed at Appeal No. 92-5356 and the

cause is remanded to the District Court for entry of judgment in favor of the Fund Defendants. Appeal No. 92-5438 is dismissed as unnecessary and untimely. The cross-appeals filed by Robert J. coar from the District Court's denial of attorney's fees are moot, as Mr. Coar makes no contention that he is entitled to fees if the Fund Defendants are successful on the merits. In addition, Mr. Coar's first cross-appeal which was docketed at Appeal No. 92-5359 was premature. Both cross appeals which were docketed at appeal Nos. 93-5359 and 92-5439 are dismissed. Costs taxed against Robert J. Coar. All of the above in accordance with the opinion of this Court.

Attest:
Clerk

Dated: April 15, 1993

Certified as a true copy and issued in lieu of
a formal mandate on May 19, 1993.

**Certified as a true copy and issued in lieu
of a formal mandate on May 19, 1993.**

Teste: /s/ P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT J. COAR,

Plaintiff,

vs.

JOSEPH KAZIMIR, et al.

Defendants.

Civil Action No.
91-3116 (MTB)

OPINION

APPEARANCES:
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By: Roger B. Kaplan, Esq.
Attorneys for Defendant

BEFORE: HON. MARYANNE TRUMP BARRY, U.S.D.J.

I. Introduction

Plaintiff Robert J. Coar has brought this action against defendants Joseph Kazimir, Rocco Morongello, William Levine, Donato DeSanti, and Robert Dudik, in their capacities as trustees of the Pension Fund of Mid-Jersey Trucking Local 701 ("the Fund"), and against the Fund itself. Among the relief Coar seeks is a declaration that defendants' actions is withholding his vested pension benefits and applying them as a set-off to his liability to the Fund violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.c. § 1001 *et seq.;* an injunction preventing further withholding of his benefits; and damages equal to the amount of pension benefits heretofore withheld.[1] *See* Amended Complaint ¶18. Defendants have counterclaimed seeking a declaratory judgment that their withholding of Coar's pension benefits because of his breach of fiduciary duty was permitted by ERISA. Answer to Amended Complaint ¶21. Presently before the court are the parties' cross-motions for summary judgment on the issue of whether defendants could withhold Coar's pension benefits and apply them as a set-off to his liability. For the reasons which follow, it is clear that they could not.

II. Factual Background

The facts underlying this action are complex and

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[1]In addition, Coar seeks interest on the benefits withheld from him and all parties seek costs and counsel fees.

need only be summarized briefly here.[2] Coar was one of two lifetime trustees of the Funds. In 1982, he and his co-trustee, Frank Scotto, entered into a contract on behalf of the Fund under which the Fund agreed to transfer $20 million for a period of thirty years to Omni Funding Group ("Omni"), a Florida-based mortage company owned by Joseph Higgens. *Id.*at 140-141. In exchange for directing this investment, Coar and Scotto, along with Fund general counsel Kenneth Zauber, solicited kickbacks form Higgins and his partner in the scheme, David Friedland, former general counsel to the Fund. *Id.* at 153. In 1987, Coar, Scotto, and Zauber were convicted of mail and wire fraud and conspiracy to receive kickbacks in violation of the Racketeering Influenced Corrupt Organizations Act (RICO), 19 U.S.C. § 1962(d). Friedland, also named in the indictment, became a fugitive and, upon his arrest, pleaded guilty. Coar's conviction for conspiracy to receive kickbacks was affirmed on appeal, although his convictions for mail and wire fraud were vacated because the government had not proved that the Fund had suffered a money or property loss. He served 18 months in prison and has since been released.

The actions of Coar and his co-conspirators also gave rise to a civil action when the Fund brought claims including, *inter alia*, a claim for breach of fiduciary duty owed to the Fund in violation of ERISA and civil RICO. *Pension Fund-Mid Jersey Trucking Industry Local 701, et al.*

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[2]For a more detailed factual recitation, *see United States v. Zauber*, 857 F.2d 137 (3rd Cir.1988)(in banc).

v. Omni Funding Group, Inc., No. 84-4332(GEB). On September 13, 1990, the Hon. Garrett E. Brown granted partial summary judgment as to liability only against Coar, Zauber, Friedland, Scotto, Higgins and Omni on, among other things, that court of the complaint alleging breach of fiduciary duty under ERISA. Subsequently, following a damage hearing, Judge Brown entered judgment against those defendants finding them to be jointly and severally liable to the Fund in the aggregate amount of $122,143,548.00. *See* Second Supplemental Affidavit of Roger B. Kaplan (hereinafter "Kaplan Second Suppl. Aff.), Exh. Q and R.[3]

This action arises out of defendants' decision, in April, 1991, to withhold pension benefits which Coar had been receiving since 1982 and apply them as a set-off for the damages for which he was liable to the Fund as the result of his breach of fiduciary duty. *See* Letter dated April 16, 1991 from Frederic Becker to Robert Coar, Affidavit of Roger Kaplan, dated February 27, 1992 (hereinafter "Kaplan Aff.") Exh. I. Defendants' decision came after Coar's liability to the Fund had been established in the civil case, but before there had been a judgment reflecting the monetary loss suffered by the

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[3]Findings of fact and conclusions of law were issued on March 19, 1992. *See* Kaplan Second Suppl. Aff., Exh.Q. Judgement was entered on April 2, 1992. Coar and codefendants Zauber, Friedland, Scotto, Higgins and Omni were found jointly and severally liable to the Fund in the amount of $25,535,887 for ERISA violations and $96,607,661 for RICO violations. *See* Kaplan Second Suppl. Aff., Exh.R.

Fund and, in particular, the loss to the Fund attributable to Coar's breach of fiduciary duty, a fact to which Coar attributes much significance. See n.7, *infra*. It is not disputed that Coar was a fiduciary who owed a duty to the Fund and breached that duty. Neither is it seriously disputed that the fund sustained a loss as a result of the kickback scheme in which Coar was a principal player.[4]

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[4]The parties differ as to whether there is an issue properly before the court concerning the Fund's construction or interpretation and application of the Plan and Trust Agreement. Defendants claim that Coar cannot be heard to challenge the Fund's construction or interpretation of the Plan and Trust Agreement because he has not exhausted is administrative remedies. Coar takes issue with this claim, contending that not only is it proper that arguments be heard with regard to the Fund's construction and interpretation of the Plan and Trust Agreement, but that the inquiry into the basis for defendants' actions must be limited to the facts as set forth in the April 16, 1991 letter from the Fund trustees to Coar informing him that this pension benefits would be applied to his liability to the Fund. *See* Kaplan Aff., Exh. I. Moreover, the parties disagree as to the effect of their March 6, 1992 stipulation, which states somewhat cryptically that

> plaintiff does not and will not dispute that, at the time the defendant trustees of the Pension Fund...made their decision in april 1991 to withhold all further pension benefits from plaintiff, the defendant trustee had before them substantial evidence that, during 1983 and 1984, the

(continued...)

III. Discussion

[1] Defendants claim that they were entitled to withhold Coar's pension benefits by virtue of section 409(a) of ERISA, 29 U.S.C. § 1109(a).[5] Essentially,

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[4](...continued)

> plaintiff...received substantial kickbacks from David Friedland in connection with the $20 million investment by the Pension Fund in 1982 with Omni Funding Group, Inc., and plaintiff does not and will not dispute such evidence in this case.

Stipulation, dated March 6, 1992 (hereinafter "Stipulation") at 1.

These differences may well present issues which could be substantial, both legally and factually. However, because the propriety of alienation or forfeiture of pension fund benefits can be resolved as a matter of law, these issues need not be addressed.

[5]Section 409(a) of ERISA provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciary by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem

(continued...)

section 409(a) renders a person who breaches a fiduciary duty to a pension fund personally liable for losses caused by or profits earned from such breach and subjects him or her "to such other equitable or remedial relief as the court may deem appropriate..." 29 U.S.C. § 1109(a). Coar, on the other hand, contends that defendants' action violated both the anti-alienation provision of section 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1), and ERISA's anti-forfeiture provision, section 203(a), 29 U.S.C. § 1053(a).[6] His primary argument is

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[5](...continued)

> appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 111 of this title.

29 U.S.C. § 1109(a). In addition, defendants cite as a basis for their counterclaim section 502(a)(3) of ERISA, which provides for civil enforcement of the Act's terms:

> A civil action may be brought-
> (3)by a participant, beneficiary, or fiduciary
> (A)to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of the subchapter or the terms of the plan...."

29 U.S.C. §1132(a)(3).

[6]Section 206(d)(1) provides that "[e]ach pension plan shall provide that benefits provided under the plan shall (continued...)

that the withholding of pension benefits without a money judgment conclusively establishing a "loss: to the Fund, although couched in terms of a set-off, was effectively a forfeiture. Thus, he contends, the court's analysis of whether his pension benefits were properly or improperly withheld should focus on the anti-forfeiture provision of section 203 of ERISA rather than the statute's anti-alienation provision, although that provision, he claims, was violated as well.[7] Resolution of these competing contentions requires a determination of the nature of the interplay between ERISA's remedial provisions relating to breaches of fiduciary duty and its

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[6](...continued)
provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). Section 203(a) provides that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age..." 29 U.S.C. § 1053(a).

[7]Coar makes much of the fact that there had been no adjudication of the amount of loss to the Fund at the time his benefits were withheld. Defendants ague, in response, that a money judgment was unnecessary because substantial evidence of kickbacks was before them at he time they acted and that was all that was required. As will become clear, it is unnecessary to decide whether a money judgment was required prior to defendants doing as they did. In any event, there now is such a judgment and Coar's reliance on the fact that there was none in April 1991 would not take him very far.

anti-alienation and anti-forfeiture provisions.

A. Alienation versus Forfeiture

Coar's attempt to convince this court that the Fund terminated his benefits "as further punishment for the breach of fiduciary duty for which he was convicted criminally," therefore implicating ERISA's anti-forfeiture provision rather than its anti-alienation provision, must fail. Pl. Br. at 17. The March 16, 1991 letter to Coar stated quite clearly that his pension benefits would be withheld "to satisfy [his] liabilities to the Pension Fund for [his] breaches of fiduciary duty...." It is plain at least from the language used by defendants that hey determined to withhold the pension benefits as a set-off against Coar's liability to the Fund and not to permanently deny benefits as punishment for his criminal actions.

Winer v. Edison Brothers Stores Pension Plan, 593 F.2d 307,312 (8th Cir.1979), which Coar cites in support of his position, is inapposite. *Winer* involved a forfeiture of pension fund benefits by operation of a "bad boy" clause which provided for the automatic disqualification from benefits of any plan member who had been dishonest with respect to the assets of or in a transaction on behalf of the corporation. The Fund in *Winer* made no claim of set-off vis-a-vis any liability to the Fund; rather, it claimed a forfeiture of the very nature sought to be eradicated by section 203(a) of ERISA, 29 U.S.C. § 1053(a). *See Winer*, 593 F.2d at 311 (citing the legislative history of the anti-forfeiture provision of ERISA). Coar cites no further authority for his invoca-

tion of ERISA's anti-forfeiture provision and, indeed, there appears to be none. Because the intention of defendants in withholding Coar's benefits was clearly to offset his liability to the Fund, and wholly aside from whether such set-off was or was not legally supportable at that time, the relevant section of ERISA in determining the propriety of the Fund's actions must be section 206(d)(1), 29 U.S.C. § 1056(d)(1), the anti-alienation provision.

B. Withholding Pension Benefits to Satisfy a Liability to the Fund for Breach of Fiduciary Duty.

[2] Having determined that defendants' action is appropriately reviewed in light of ERISA's anti-alienation provision, the court must determine whether the remedy of set-off, comprehended within the "such other equitable relief as the court may deem appropriate" language of section 409(a), acts as an exception to the general prohibition against the alienation of such benefits.[8] In their regard, the Supreme Court's opinion in *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990) is

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[8]Defendants cite *Carson v. Local 1588, International Longshoremen's Ass'n*, 769 F. Supp. 141 (S.D.N.Y.1991), as support for the proposition that a plan could offset losses by withholding pension benefits upon the beneficiary's breach of fiduciary duty. While that was, in fact, the case in *Carson*, it was only because the non-forfeiture and non-alienation rules do not apply to a top-hat pension, the pension at issue in *Carson* by virtue of the specific exemption found in 29 U.S.C. § 1051(2).

highly instructive.

As an initial matter, it bears mention that *Guidry* expressly left open the matter now before the court. *Id.* at 365,110 S.Ct. at 681. Because the pensioner in that case had breached a fiduciary duty to the union itself rather than to the Fund, the Court found section 409(a) inapplicable and specifically refused to decide whether the remedial provisions of 409(a) supersede the bar on alienation in section 206(d)(1). Resisting the "natural tenency to blur the distinction between a fund and its related union." the Court looked instead to section 501(b) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 501(b).[9]

There are similarities, however, between section 501(b) of the LMRDA and section 409(a) of ERISA, thus rendering much of *Guidry's* reasoning and analysis apt to the instant matter. *Compare* LMRDA section 501(b),

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[9]Section 501(b) of the LMRDA provides for a private right of action in federal court to recover damages or "other appropriate relief for the benefit of the labor organization" for breaches of fiduciary duty by union officers. 29 U.S.C. §501(b). Having found no significant difference between a writ of garnishment and a constructive trust, *see Guidry*, 493 U.S. at 372, 110 S.Ct. at 685, the Court assumed that "other appropriate relief" may authorize, under certain circumstances, the imposition of a constructive trust. *Id.* at 374, 110 S.Ct. at 686. Nevertheless, the Court was persuaded that the countervailing interest expressed by ERISA's anti-alienation provision prevented the imposition of a constructive trust on pension benefits. *See Guidry*, 493 U.S. at 375, 110 S.Ct. at 687.

29 U.S.C. § 501(b)("or other appropriate relief") with ERISA section 409(a). 29 U.S.C. § 1109(a)("and shall be the subject to such other equitable or remedial relief as the court may deem appropriate"). And, importantly here, the Court's interpretation of section 206(d)(1) is right on point, Thus, *Guidry's* discussion of the prohibition on the assignment or alienation of pension benefits set forth in section 206(d)(1) of ERISA is extremely important for this court's purposes.

The Court noted that section 206(d)(1)is clear and reflects a "considered...decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless) even if that decision prevents others from securing relief for the wrongs done to them." *Id.* Thus, the Court continued, courts should generally be loathe to create equitable exceptions to unqualified statutory pronouncements. *Guidry*, 493 U.S. at 376, 110 C. Ct. at 687.

> The creation of such exceptions, in our view, would be especially problematic in the context of an antigarnishment provision. Such a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended only on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then refuse enforcement whenever enforcement appears inequita-

> ble. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the full in particular circumstances would be "especially" inequitable. The impracticality of defining such a standard reinforces our conclusion that the identification of any exception should be left to Congress.

Id. at 376-77, 110 S.Ct. at 687-688 (emphasis in original). The Court recognized that the operation of an antigarnishment provision, like the anti-alienation provision of section 206(d)(1), will almost always seem inequitable. Despite the "natural distaste" for such a result, the Court nevertheless paid deference to the legislative policy decisions behind the anti-alienation provision and left any change in that policy to Congress. *Id.* at 377, 110 S.Ct. at 688.

Guidry, of course, involved reconciling two distinct statutes: the "other appropriate relief" power of the LMRDA and the anti-alienation language of ERISA. Here, the reconciliation must take place within ERISA itself with the court determining whether Congress intended that the remedial aspects of section 409(a) supersede the anti-alienation provision of section 1056(d)(1).

The District of Columbia Circuit, in its opinion in *Crawford v. La Boucherie Bernard Ltd.*, 815 F.2d 117 (D.C.Cir.), *cert. denied*, 484 U.S. 943, 108 S.Ct.328, 98 L.Ed.2d 355 (1987), answered this question in the

affirmative. In reaching its conclusion, the *Crawford* court noted that ERISA's anti-alienation provision is "not immutable," citing decisions in which the garnishment of pension plan benefits was permitted to satisfy family support and community property obligations of divorce decrees and to satisfy liabilities arising from an employee's criminal misconduct toward his employer. *Crawford*, 815 F.2d at 121 (citing *American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118(2d Cir.1979); *Stone v. Stone*, 450 F.Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir.1980), *cert. denied sub nom. Seafarers International Union, Pacific District-Pacific Maritime Association Pension Plan v. Stone*, 453 U.S. 922, 101 S.Ct.3158, 69 L.Ed.2d 1004 (1981); and *St. Paul Fire and Marine Insurance Co. v. Cox*, 752 F.2d 550 (11th Cir.1985)).

This conclusion, however, has been vitiated not only by *Guidry* itself, which held that it is not for a court to declare that an employee's criminal misconduct can be the basis for an offset, but by the passage of section 104(a) of the Retirement Equity Act of 1984, 29 U.S.C. § 1056(d)(3), subsequent to the domestic relations decisions relied on by the *Crawford* court. Section 104(a) excepts certain domestic relations orders from the anti-alienation provision, and that Congress chose to do so indicates a willingness to create such policy-oriented exceptions where appropriate. Indeed, the Supreme Court noted this fact in reaching its conclusion in *Guidry* that the equitable enforcement provision of the LMRDA should not override ERISA section 1056(d)(1). *See Guidry*, 493 U.S. at 376 n. 18, 110 S.Ct. at 687 n. 18.

The precedential value of *Crawford* is, at least in

this court's view, questionable in light of the Supreme Court's subsequent decision in *Guidry*. The Fifth Circuit, in *Herberger v. Shanbaum*, 897 F. 2d 801 (5th Cir. 1990), held, as does this court, that section 409(a) cannot override the anti-alienation provision of section 206(d)(1). The court considered *Crawford* in light of *Guidry* and determined that *Guidry* had seriously undermined much of the reasoning of the *Crawford* court. *Herberger*, 897 F.2d at 804. The court noted that the Supreme Court in *Guidry* rejected the notion, suggested in *Crawford*, that a generalized equitable exception to the anti-alienation provision is warranted by virtue of ERISA's legislative history endorsing traditional trust principals. *Id.* Instead, *Herberger* extrapolated that the Supreme Court's strict application of the anti-alienation section would lead the court to reject an exception based on section 203(a).*Id.*

This view, however, is not unanimous. A contrary view was taken by the court in *Pension Benefit Guaranty Corp. v. Solmsen*, 743 F.Supp.125 (E.D.N.Y.1990), which, undaunted by the Supreme Court's analysis in *Guidry*, adopted the reasoning of *Crawford* and permitted a pensioner's benefits to be used as a set-off for his liability for breach of fiduciary duty. The court, recognizing that *Guidry* had left open the question of whether section 409(a) could supersede the anti-alienation provision of ERISA, considered and rejected the reasoning of *Herberger*. *Solmsen*, 743 F.Supp. at 129. In addition to explicitly relying on *Crawford's* analysis, the court opined that "common sense suggest[s] that set-off is permissible."

This reasoning, however, flies in the face of the Supreme Court's teaching in *Guidry:* despite the natural distaste for permitting a beneficiary who has wronged the pension fund to collect benefits while his or her debt remains outstanding, a legislative policy determination has been made and the statute, ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1), is clear. *Guidry*, 493 U.S. at 365, 110 S.Ct. at 681. Thus, *Solmsen's* comment that"[n]o good reason appears as to why Guaranty Corp. should have to pay benefits to a person who has wronged the Plan, and the beneficiaries of it, before he has made good the wrong" is more appropriately addressed to the legislature rather than the courts seeking to interpret the law as it now stands.[10]

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[10]In their attempt to distinguish *Herberger*, defendants rely on the *Solmsen* court's view of *Herberger* as a case dealing with a set-off remedy as applied to a third party who participated in the fiduciary breach of another rather than someone who himself breached a fiduciary duty. Such reliance is misplaced, for in this regard the *Solmsen* court is simply wrong. While there was a case related to and discussed in *Herberger* which dealt with the same person's (Shaubaum's) participation in the breach of fiduciary duty of another, *see McLaughlin v. Lindermann*, 853 F.2d 1307 (5th Cir.1988), the facts at issue in *Herberger* were not those. in *Herberger*, a pension beneficiary brought suit against the successors to his former employer, Shanbaum, an individual named Carp, and the Lee Optical Pension Plan, who had been the sole shareholders of the employer-corporation, to recover benefits owed to him.

(continued...)

IV. Conclusion

Recognizing that *Guidry* left open the question of whether the remedial provision of ERISA section 409(a), 29 U.S.C. § 1109(a), can serve as an exception to the unqualified statutory language of the anti-alienation provision of ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1), this court holds that the Supreme Court's reasoning in *Guidry* counsels a strict application of the anti-alienation provision, and that defendants cannot withhold Coar's benefits and apply them as a set-off to his liability to the Fund. To echo the sentiments of the Supreme Court, while this result may be unpalatable, and it is unpalatable in this case, for Coar has hardly bathed himself in glory, it is nevertheless in accordance with the law, and any change must come from Congress rather than from the court.

Coar's motion for summary judgment will,

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[10](...continued)
The pension plan settled with the beneficiary; at a later trial the court awarded plaintiff damages against Shanbaum and Carp, as well as an indemnification judgment against Shanbaum in favor of the pension plan for Shanbaum's *direct breach of his fiduciary duty to the plan*. *Herberger*, 897 F.2d at 802. When this judgment proved uncollectible, the pension plan sought to withhold Shanbaum's pension benefits as a set-off for his liability to the Plan for his direct breach of fiduciary duty. *Id*. Therefore, any distinction defendants suggest based on *Herberger's* consideration of mere participation by a third party in the breach of fiduciary duty of another is wholly illusory.

therefore, be granted and defendants' motion will be denied. Concomitantly, Coar's motion to dismiss the counterclaim will be granted and defendants' motion for judgment on the counterclaim will be denied.[11] Counsel for Coar shall submit an order reflecting this opinion within ten days of its date.

/s/MARYANNE TRUMP BARRY, U.S.D.J.

Dated: May 12, 1992

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[11]It follows inexorably that those benefits wrongfully withheld from Coar are to be paid to him, together with interest at the appropriate rate, and defendants are to do so within thirty days of this date. It follows, as well, that no further benefits are to be withheld as a set-off for liability for the breach of Coar's fiduciary duty to the Fund. Finally, Coar will be awarded reasonable counsel fees and costs. 29 U.S.C. § 1132. In this connection, counsel shall submit the necessary affidavit within twenty days of this date.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT J. COAR, Plaintiff, vs. **JOSEPH KAZIMIR, et al.** Defendants.	Civil Action No. 91-3116 (MTB) ORDER

This matter having come before the court upon the motion of plaintiff Robert Coar by his attorney, Hayden, Perle and Silber, pursuant to Fed. R. Civ. P. 56, for an order granting summary judgment in favor of plaintiff upon plaintiff's amended complaint, in the presence of Wilentz, Goldman and Spitzer, Esqs. (Roger Kaplan, Esq., appearing), attorneys for defendants Joseph Kazimir, Rocco Morongello, William Levine, Donato D'Santi, and Robert Dukik in their capacities as Trustees of the Pension Fund-Mid Jersey Trucking Industry-Local 701 (collectively "the Trustees"), and said defendant Trustees, having cross-moved for summary judgment upon their counterclaim, and the Court having reviewed the briefs and supporting documents filed in support of the motion and the cross-motion, and for good cause appearing, as set forth in

the decision of the Court, filed May 12, 1992;

IT IS on this 23rd day of June, 1992 hereby

ORDERED:

A. That plaintiff's motion for summary judgment is granted and defendants' motion for summary judgment is denied;

B. That defendants are permanently enjoined and restrained from withholding, delaying or otherwise limiting the payment of plaintiff's pension benefits on account of his liability to the Fund to plaintiff or any person who may be entitled to receive those benefits;

C. That judgment is entered in favor of plaintiff and against defendants in the amount of $18,061.62 in past benefits together with interest of $475.26 as of June 22, 1992, same to be paid to plaintiff within thirty days of the date of this order;

Costs to plaintiff.

/s/ MARYANNE TRUMP BARRY, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT J. COAR, Plaintiff, vs. **JOSEPH KAZIMIR, et al.** Defendants.	Civil Action No. 91-3116(MTB) ORDER

This matter having come before the court upon the motion of defendants for reconsideration or to alter or amend the court's May 12, 1992 Opinion ("Opinion") in its entirety or for reconsideration or to alter or amend that portion of the Opinion awarding costs and attorney's fees to plaintiff, pursuant to Fed. R. Civ. P. 59 and 60, or, in the alternative, for a stay of the decision and judgment pending exhaustion of all appeals, pursuant to Fed.R.Civ.P.62(c); and the court having considered the submissions of the parties both in support of and in opposition to the motion without oral argument pursuant to Fed. R. Civ. P. 78; and

it being the opinion of the court that Fed. R. Civ. P. 59(e) provided that a party may move to alter or amend a judgment within ten days of the entry of

judgment; [1] and

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[1]Defendants; motion will be treated as one for reconsideration under Rule 59(e) and General Rule 12(I) of the United States District Court of the District of New Jersey. There has, however, been no judgment entered, and the language of Rule 59(e) states that a motion thereunder must be filed "not later than 10 days after entry of the judgment." Courts and commentators have held, and I agree, that this ten day time period is only a maximum time period and that the rule does not require that there be a pre-existing judgment. Jurgens v.McKasy, 905 F. 2d 382,385-86 (Fed. Cir. 1990), cert. denied, 112 S. Ct. 281 (1991); Smith v. Hudson, 600 F.2d 60, 62 (6th Cir.), cert.denied, 444 U.S. 986 (1979); Jetero Constr. Co. v. South Memphis Lumber Co., 531 F.2d 1348,1351 (6th Cir.1976); 9 J. Moore, B. Ward & J Lucas, Moore's Federal Practice ¶ 204.12[4](2d ed.1989); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2812 at 81-82(1973).

As for defendants' invocation of Rule 60, the only possible section under which defendants could seek relief if Rule 60(b)(6), which authorized the court to take action based on "any other reason justifying relief from the operation of the judgement." Defendants' arguments in favor of relief, however, are simply legal arguments. it is well established that Rule 60(b) is not to be a substitute for appeal, Martinez-McBean v. Government of Virgin Islands, 562 F. 2d 908,911 (3rd Cir.1977), but is to be used to grant relief in extraordinary situations. Moolenaar v. Government of Virgin Island, 822 F. 2d 1342, 1346 (3d Cir. 1987). The Third Circuit has held that legal error is not an extraordinary circumstance which would justify the application of Rule 60(b). Martinez-McBean, 562 F. 2d at 912.

it being the opinion of the court that General Rule 12(I) provides that a party may make a motion for reargument when there are "matters or controlling decisions which counsel believes the Court has overlooked;" General Rule 12(I) of the United States District Court for the District of New Jersey; and

the court considering first defendants' motion for reconsideration or reversal of that portion of the Opinion granting summary judgment in favor of plaintiff; and

it being the opinion of the court that its Opinion was by no means based upon an "implicit and explicit assumption that the anti-alienation provision of ERISA...was inflexible and permitted no exceptions absent Congressional action," Def. Br. in Support of Reconsideration at 2, but rather was based upon the court's interpretation of ERISA in light of the applicable case law, including, inter alia, Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365 (1990)[2]; and

it being the opinions of the court that defendants' citations to judicial and administrative interpretations of ERISA are not binding on the court, and, in light of the

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[2] Defendants argue that the court ignored the fact that Guidry left open the question before the court. Defendants are mistaken. See Opinion at 9 & 15. Moreover, simply because Guidry expressly left open this issue does not mean that Guidry's reasoning is inapplicable here.

precedent cited in its Opinion, the court does not find them persuasive; and

the court considering second defendants' motion for reconsideration or reversal of that portion of the Opinion awarding counsel fees and costs to plaintiff under 29 U.S.C. § 1132; and

it being the opinion of the court that ERISA section 502(g)(1) provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party;" 29 U.S.C. § 1132(g)(1); and

it being the opinion of the court that in considering whether to ward attorney's fees and costs, five factors should be considered: (1) the offending party's culpability or bad faith; (2) the ability of the offending party to satisfy an award of attorney's fees; (3) the deterrent effect of an award of attorney's fees against the offending party; (4) the benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' position; Ursic v. Bethlehem Mines, 719 F. 2d 670,673 (3d Cir.1983); see also Ellison v. Shengano Inc. Pension Board, 956 F. 2d 1268,1273 (3d Cir.1992); Monkelis v. Mobay Chemical, 827 F. 2d 935, 936 (3d Cir. 1987);[3] and

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[3]In support of his argument for counsel fees, plaintiff cites to Amith v. CMTA-IAM Pension Trust, 746 F. 2d 587,589 (9th Cir.1984) and the Ninth Circuit's statement that "absent special circumstances, a prevailing ERISA employee plaintiff should ordinarily recover attorneys' fees from the defendant." However, the Third Circuit in its recent opinion in Ellison explicitly

(continued...)

it being the opinion of the court that defendants did not act in bad faith in withholding plaintiff's pension benefits, inasmuch as defendants waited until after partial summary judgment as to liability, albeit no judgment, was rendered against plaintiff in the action before the Hon. Garrett E. Brown and on equitable grounds, as least, to withhold payment was eminently appropriate; and

it being the opinion of the court that, although the court disagrees with defendants' position as to their right as a matter of law to withhold plaintiff's pension benefits under ERISA, defendants' position is supported by some case law, is not totally without merit, and remains an open question in the Third Circuit; and

it being the opinion of the court that, because defendants were acting to preserve the assets of the Fund for the benefit of all it members and did not violate clearly established law at the time, there is no

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[3](...continued)
rejected the "special circumstances" test employed by the Ninth Circuit in Smith. Ellison v. Shenango Inc. Pension Board, 956 F.2d 1268,1275 (3d Cir.1992). In the course of rejecting the "special circumstances" test, the court found that adoption of that test in ERISA cases is not justified by analogy to fee provisions in similar remedial legislation, id, although plaintiff argues that it is. I cannot, however, write on a clean slate, as plaintiff would have me do, when the Third Circuit has rejected a presumption in favor of granting attorney's fees to prevailing parties and requires application of the Ursic factors.

need to deter defendants' conduct; and

it being the opinion of the court that, while plaintiff's action conferred a monetary benefit only on himself, his action may confer a benefit on other members of the Fund in that the Fund now knows that it cannot withhold pension benefits from a member based on that member's breach of fiduciary duty to the Fund; see Grove v. Modified Retirement Plan for Hourly Paid Employees of Johns Manville, Corp. and Subsidiaries, 803 F. 2d 109, 119-20 (3d Cir. 1986), although this factor does not weigh heavily in plaintiff's favor; and

it being the opinion of the court that the fund easily has the capacity to pay an award of attorney's fees and costs; and

it being the opinion of the court that in balancing the five factors set forth in Ursic, the balance comes down in defendants' favor and defendants will not be required to pay attorney's fees and costs in connection with this action;[4]

the court considering third defendants' request for a stay of enforcement of the judgment pending appeal pursuant to Fed.R.Civ.P.62(c); and

it being the opinion of the court that in considering a motion to stay a judgment pending appeal, pursuant to Rule 62(c), the court should consider (1) whether the stay applicant has made a strong showing

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[4]While costs will not be awarded under ERISA, "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed.R.Civ.P.54(s). Costs will be allowed here.

that he or she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies; Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Evans v. Buchanan, 435 F. Supp. 832, 844 (D.Del.1977)("a stay may be appropriate in a case where the threat of irreparable injury to the applicant is immediate and substantial, the appeal raises serious and difficult questions of law in an areas where the law is somewhat unclear and the interests of the other parties and the public are not harmed substantially"); and

it being the opinion of the court that while defendant may be able to demonstrate that there is a "serious" question of law on appeal, see Evans, 435 F. Supp. at 844, defendant will not be irreparably harmed in the absence of a stay and, in any event, the harm plaintiff would suffer if a stay were issued counsels against the issuance of a stay pending appeal;

IT IS on this 23rd day of June, 1992 hereby

ORDERED that defendants' motion for reconsideration or to alter or amend that portion of the court's May 12, 1992 Opinion granting summary judgment in favor of plaintiff is denied; and it is further

ORDERED that defendants' motion for reconsideration or to alter or amend that portion of the court's May 12, 1992 Opinion awarding attorney's fees and costs to plaintiff is granted and that the portion of the Opinion awarding attorney's fees and costs is hereby vacated; and it is further

ORDERED that defendants' motion for a stay of the judgment pending appeal is denied; and it is further

ORDERED that defendants' motion for a stay of the judgment pending appeal is denied; and it is further

ORDERED that plaintiff's fee application is denied.[5]

/S/_____
MARYANNE TRUMP BARRY
U.S.D.J.

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[5]It is further ordered, pursuant to Fed. R. Civ. P. 60(a) that a clerical error in the court's Opinion be corrected so that the first sentence of footnote 10 of the Opinion reads as follows:

> In their attempt to distinguish Herberger, defendants rely on the Solmsen court's view of Herberger as a case dealing with a set-off remedy as applied to a third party who participated in the fiduciary breach of another rather than someone who himself breached a fiduciary duty.

Supreme Court, U.S.
FILED
AUG 9 1993
OFFICE OF THE CLERK

No. 93-62

In The

Supreme Court of the United States

October Term, 1993

ROBERT J. COAR,

Petitioner,

vs.

JOSEPH KAZIMIR, ROCCO MORONGELLO, WILLIAM LEVINE, DONATO DeSANTI, and ROBERT DUDIK, as Trustees of the Pension Fund Mid-Jersey Trucking Industry-Local 701, and PENSION FUND MID-JERSEY TRUCKING INDUSTRY LOCAL 701,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions here presented under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") are:

1. Does the bar on "alienation" in § 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1), encompass a set-off by the Pension Plan itself — as opposed to a garnishment, levy or attachment by a third party creditor — against a fiduciary's pension benefits, so as to recoup the losses caused to the Plan by that fiduciary's breach of his fiduciary duties owed to the Plan under ERISA?

2. Does § 409(a) of ERISA, 29 U.S.C. § 1109(a), afford the Plan the equitable and remedial remedy of a set-off and recoupment against a fiduciary's pension benefits from the Plan so as to recoup the Plan's losses caused by the fiduciary, which remedy supersedes the more general bar on "alienation" of benefits in § 206(d)(1) of ERISA?

3. Does a construction of § 206(d)(1) of ERISA as insulating the pension benefits of a Plan fiduciary who has depleted and misappropriated funds from the Plan against remedies by the Plan against the fiduciary under § 409(a) yield an "absurd" result that could not have been intended by Congress?

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I. The decision of the Third Circuit Court of Appeals is correctly reasoned and does not conflict with the decision of this Court in *Guidry*. 6

II. The issues presented here are not sufficiently significant to merit review by this Court having been the subject of only four decisions during the nineteen-year history of ERISA, three of which are in accord with the Third Circuit's decision below. 9

III. The Third Circuit's opinion avoided an absurd result that would have subverted the protection of beneficiaries that is among the primary purposes of ERISA. 11

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APPENDIX

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. Pa 1-41) is reported at 990 F.2d 1413. The opinion of the district court below (Pet. App. Pa 42-69) is reported at 792 F. Supp. 345.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 15, 1993. A petition for rehearing was denied on May 11, 1993. The petition for a writ of certiorari was filed within ninety days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Relevant Facts

In 1986, Petitioner Robert J. Coar ("Coar"), a former trustee and current participant of the Pension Fund, Mid-Jersey Trucking Industry, Local 701 (the "Pension Fund" or the "Fund") was convicted, along with his co-trustee and the general counsel of the Fund, of engaging in a conspiracy among themselves and with others in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") to misappropriate $20 million (twenty percent) of the Fund's assets to invest in a sham investment for their and their co-conspirators' benefit. The conviction was affirmed on appeal in *United States v. Zauber, Coar and Scotto,* 857 F.2d 137, 140, 149-53 (3rd Cir. 1988), *cert. denied,* 489 U.S. 1066 (1989). The criminal case and the uncontradicted evidence in the district court below showed that, as part of the RICO conspiracy, petitioner Coar personally received a portion of the Fund's misappropriated assets in the form of kickbacks.[1]

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1. Despite the statements in the Petition as to petitioner's age and financial

(Cont'd)

In October 1984, prior to the indictment, the Fund and its new trustees filed a civil case against Coar, his co-conspirators, and certain other defendants, alleging ERISA and RICO violations arising from the $20 million misappropriation. On September 13, 1990, the district court in that prior civil case granted summary judgment on liability for the Fund against Coar and others. Ultimately, the district court in the prior civil case entered a final, unappealed judgment against Coar for $25,535,887 for fiduciary duty violations under §§ 409(a) and 502(a) of ERISA, 29 U.S.C. §§ 1109(a) and 1132(a), and a judgment for $96,607,661 for RICO violations.[2]

On April 16, 1991, prior to the entry of the final judgment against Coar in the prior civil action, but after the court had found Coar liable, the Pension Fund advised Coar that it would set-off and recoup Coar's liability to the Pension Fund against his benefits from the Fund, beginning with the May 1991 benefits payment. This determination was made pursuant to a number of provisions in the Pension Fund's Trust Agreement and Pension Plan which gave the Fund's trustees broad discretion: (a) to construe and administer

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(Cont'd)
condition, no competent evidence was ever submitted on these subjects. Indeed, under a claim of Fifth Amendment privilege, petitioner has consistently refused to be deposed and has never signed an affidavit as to the particulars of his financial status or that of his alleged dependents, or on any other subject. Moreover, in the proceedings below the Pension Fund stipulated that this case does not, and could not, have any effect on the "survivor" or any other pension benefits from the Fund enjoyed by petitioner's spouse or children (Pet App. at Pa 5 n.2; Resp. App. at Ra 13a).

2. The $25,535,887 damage figure represented the unrecovered portion of the misappropriated $20 million (net of any settlements in litigation to recover its assets), plus what the Fund would have earned had the Fund's assets continued to be invested with the Pension Fund's regular investment managers, pursuant to § 409(a) of ERISA.

the Trust and Plan as imposing no greater obligation on the Fund than that imposed by law under ERISA; (b) to take a set-off against future benefits for prior overpayments to a participant; and (c) to determine the facts in connection with any "benefits" claim or determination.[3]

B. Proceedings Below

On July 17, 1991, petitioner Coar filed this action against the Fund to obtain his pension benefits under § 502(a)(1) of ERISA, 29 U.S.C. § 1132(a)(1). Coar claimed that the Fund's withholding of benefits violated the non-forfeiture and anti-alienation provisions of ERISA, §§ 203(a) and 206(d)(1), 29 U.S.C. §§ 1053(a) and 1056(d)(1). The Fund Defendants[4] answered and filed a counterclaim seeking a declaratory judgment that the Pension Fund's withholding of benefits under §§ 409(a) and 502(a) of ERISA, 29 U.S.C. §§ 1109(a) and 1132(a), did not violate ERISA's non-forfeiture and anti-alienation provisions. The parties each moved for summary judgment.

On May 12, 1992, the district court issued an opinion holding that, although the non-forfeiture provision of ERISA did not bar the set-off, the anti-alienation provision forbade a set-off by the Pension Fund for its losses and damages caused by Coar. *Coar v.*

---

3. When the trustees determined to offset petitioner's § 409(a) liability to the Fund against petitioner's benefits, in April 1991, the Pension Fund had already obtained extensive damage studies showing a loss in excess of $25 million to the Fund resulting from petitioner's malfeasance. Based upon these very damage studies, the district court in the prior civil case ultimately entered a final judgment against Coar in excess of $25 million on the Fund's ERISA fiduciary duty claims, and in excess of $96 million on its RICO claims.

4. The Fund Defendants are Joseph Kazimir, Rocco Morongello, William Levine, Donato DeSanti, and Robert Dudick, Fund Trustees, and the Pension Fund of the Mid-Jersey Trucking Industry, Local 701.

Kazimir, 792 F. Supp. 345 (D.N.J. 1992) (Pet. App. Pa 42-59). The district court denied the Fund's motion for summary judgment and granted summary judgment to Coar, together with an award of attorneys' fees under § 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1). *Id.* On May 20, 1992, on defendants' motion for reconsideration of the summary judgment decision and the attorneys' fee award, the district court reaffirmed its summary judgment decision, but reversed the fee award to Coar (Pet. App. Pa 62-69). The district court entered final judgment for Coar on June 23, 1992 (Pet. App. Pa 60-61). The Fund Defendants appealed the entry of summary judgment. Petitioner did not appeal the District Court's finding of no forfeiture under § 203 of ERISA.

Despite petitioner's somewhat hyperbolic description of the decision of the court of appeals, the Third Circuit conducted a detailed and painstaking statutory analysis to arrive at its conclusion. *Coar v. Kazimir*, 990 F.2d 1413 (3rd Cir. 1993) (Pet. App. Pa 1-35). The court recognized that this case differed from *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990), in that it required the interpretation of two provisions of the *same statute*. *Coar, supra*, 990 F.2d at 1419 (Pet. App. Pa 18-19). As a result, the Third Circuit determined that the purpose of the statutory analysis was to reconcile the two sections of the same statute and apply both without undermining the purpose of either provision. *Id.*

The court below analyzed both sections of the statute here at issue in order to arrive at a rational and harmonious interpretation of their provisions. *Id.* at 1420 (Pet. App. Pa 19). Following this Court's analysis in *Guidry*, the Third Circuit found that the more specific mandate in § 409(a) to remedy losses caused by fiduciary breaches was a better indicator of Congressional intent than the more general bar on alienation under §206(d)(1). *Id.* at 1420 (Pet. App. at Pa 20). Moreover, as the court below noted, allowing a breaching fiduciary to collect benefits would effect a further

depletion of the Fund's assets available to pay beneficiaries, in direct contravention of the purpose of the anti-alienation provision as stated in the legislative history. *Id.* at 1421 (Pet. App. at Pa 20-21). Thus, the court below concluded that § 206(d)(1) did not limit the remedies available under § 409(a) to assure that breaching fiduciaries make good the losses and damages they have caused pension funds. *Id.* at 1420-21 (Pet. App. at Pa 21).[5]

The court below also examined the meaning of the term "alienation" as used in § 206(d)(1). After a careful study of the legislative history of that section, the regulations enacted by administrative agencies thereunder, and the relevant case law, the court held that the set-off employed by the Fund in this case was not an "alienation" within the meaning of § 206(d)(1) because it was not a garnishment, levy or attachment by a third party creditor. The Fund's action here amounted only to a netting out or offsetting of accounts or mutual debts between the Fund itself and its own trustee/beneficiary. *Id.* at 1421-23 (Pet. App. Pa 21-25). Thus, the court below concluded that the traditional trust remedy of applying a breaching trustee/beneficiary's benefits to offset his or her liability to the Fund was not barred by § 206(d)(1) because such an offset was not an "alienation" under § 206(d)(1). *Id.* at 1422 (Pet. App. Pa 24).

Finally, the Third Circuit also addressed the policy concerns raised by the Supreme Court in *Guidry, supra,* 493 U.S. at 375, against creating "general equitable exceptions" to an "anti-garnishment" rule. *Id.* at 1422 (Pet. App. Pa 25). While acknowledging that it was unnecessary in this case to find that § 409(a) overrides § 206(d)(1), the court below concluded that this

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5. Contrary to petitioner's contention that the court of appeals cited no authority (Pet. at 11), the court quoted from the text of § 409(a) and found that the phrase "other equitable or remedial relief" provided ample basis and authority for its finding that § 409(a) should control over § 206(d)(1).

Court's admonition against creating "generalized equitable exceptions" to § 206(d)(1) was simply not applicable here. *Id.* The court of appeals reversed the judgment of the district court and remanded the case for the entry of judgment pursuant to its opinion.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IS CORRECTLY REASONED AND DOES NOT CONFLICT WITH THE DECISION OF THIS COURT IN *GUIDRY.*

The opinion of the Third Circuit reflects a careful and detailed consideration of §§ 409(a) and 206(d)(1) of ERISA that is in full accord with the statutory analysis of this Court in *Guidry.* The court of appeals correctly reversed the district court and held that in these circumstances ERISA does permit a pension fund to withhold the benefits of a breaching fiduciary to offset or recoup losses that the fiduciary's breach caused the fund. The decision of the court below was rooted in the plain meaning of the statute, as well as the relevant legislative history. Further review is not necessary.

Petitioner contends that the Third Circuit's decision ignores the admonition of *Guidry* against creating "general equitable exceptions" to the anti-alienation provisions of ERISA as an "anti-garnishment provision," and that the decision will undermine the protection of benefits afforded by § 206(d)(1) (Pet. 7-8, 21). Both the transcript of oral argument before the court of appeals and the court's opinion demonstrate the error in these contentions. As was plainly established at oral argument (Resp. App. at Ra 5), respondents do not seek any "equitable exception" to § 206(d)(1),

and the Third Circuit was well aware of *Guidry's* proscription of such exceptions when it decided this case (Resp. App. at Ra 6).

Rather, the court of appeals properly sought to balance the specific language and remedies of § 409(a), dealing specifically with remedies against breaching fiduciaries, against the more general language and proscription of § 206(d)(1), generally dealing with benefits for all participants, not just fiduciaries (Resp. App. at Ra 5-6). No general or equitable exception to alienation, such as that proposed and rejected in *Guidry,* was necessary to resolve this case (Resp. App. at Ra 5). Furthermore, while recognizing the necessity of maintaining strict limits on equitable exceptions to the "anti-garnishment" rule, the Third Circuit specifically found that no danger of inviting "all sorts of third party claims" existed in this case. *Coar, supra,* 990 F.2d at 1422 (Pet. App. at Pa 25-26).

Thus, contrary to petitioner's argument (Pet. 10-11), the Third Circuit's statutory analysis reveals a careful effort to examine the plain meaning of the statute, and the relevant legislative history, consistent with the very principles set forth in *Guidry.*[6] The decision below is also consistent with this Court's most recent decision in *Mertens v. Hewitt Associates,* __ U.S. __, 113 S.Ct. __, 124 L. Ed. 2d 161 (June 1, 1993), in which both the majority and

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6. Petitioner's reliance on this Court's decision in *Patterson v. Shumate,* __ U.S. __, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992), is plainly misplaced. *Patterson* is not controlling in this case because, like *Guidry,* it did not involve a trustee who had breached a fiduciary duty to the pension fund. *See Patterson, supra,* 112 S. Ct. 2242. The issue in *Patterson* was whether a third party creditor (the trustee of the beneficiary's bankruptcy estate) could require that the benefits be paid to the bankruptcy estate rather than the beneficiary. *Id.* The Court held that, under the Bankruptcy Code (11 U.S.C. § 541(c)(2)), the pension benefits were not subject to the claims of the bankruptcy estate. Thus, *Patterson* did not involve a reconciliation of §§409(a) and 206(d)(1) of ERISA and has no relevance to the issues presented in this case. The case is entirely inapposite.

dissenting opinions recognized the broad scope of "other equitable or remedial relief" under § 409(a) of ERISA. 124 L. Ed. 2d at 170-171 n.8 and 179 n.4.

Moreover, petitioner does not address the court of appeals' analysis of the term "alienation," as used in § 206(d)(1), or its conclusion that it does not apply to the situation at hand. *Id.* at 1421 (Pet. App. Pa 24). Petitioner has chosen to critique only the Third Circuit's finding that § 409(a) is the more specific of the two provisions at issue, and has offered no grounds for reviewing the lower court's holding regarding the scope of the anti-alienation provision under § 206(d)(1). Petitioner misreads the Third Circuit's holding on the scope of the term "alienation" as mere *dicta* in support of its specificity analysis (Pet. 11). To the contrary, the finding that "alienation" does not even apply to the actions of the Fund in this case provides an additional independent basis for the court's decision.[7] The court of appeals correctly distinguished a levy, execution, garnishment or other collection process by a third party creditor from attempts by the Fund itself to recoup or offset amounts owed to it against "its own obligation" to the beneficiary in question. *Id.* at 1421 (Pet. App. Pa 23-24). Given that a set-off or recoupment is merely a "netting" out of mutual debts, to arrive at a "net" due to one party, there simply is no levy, execution or garnishment within the meaning of "alienation" under § 206(d)(1).

Petitioner also fails to mention that the agency charged with administering and construing the "anti-alienation" provision of ERISA has issued regulations that fully support the Third Circuit's view of the scope of the term "alienation" under § 206(d)(1).

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7. The court below relied upon the reference in ERISA's legislative history to "levy or garnishment" and on *Guidry's* characterization of § 206(d)(1) as an "anti-garnishment provision" in interpreting this provision. *See* Opinion, *supra*, 990 F.2d at 1420-21.

Under this Court's decision in *Chevron, U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), the Third Circuit properly afforded weight and deference to the controlling "anti-alienation" regulations issued by the Internal Revenue Service under 26 C.F.R. § 1.401(a)-13(b)(1)-(d)(2) (1992). *Id.* at 1421 (Pet. App. Pa 24).[8]

These IRS regulations expressly exclude from the definition of "alienation" actions by a fund itself "to apply or set-off pension benefits to recover debts owed by the participant to the plan. . . ." *Coar, supra,* 990 F.2d at 1422 (Pet. App. Pa 24). In light of this interpretation, and the language of § 206(d)(1) itself, requiring only that benefits not be "assigned or alienated," the court of appeals correctly concluded that the Fund's set-off and recoupment of the mutual debts in this case "was simply not an alienation within section 206(d)(1)". *Id.* Petitioner fails to offer any reason to review this determination, and offers no argument why the court of appeals' reading of § 206(d)(1) was incorrect — a concession fatal to his case for review.

II.

THE ISSUES PRESENTED HERE ARE NOT SUFFICIENTLY SIGNIFICANT TO MERIT REVIEW BY THIS COURT HAVING BEEN THE SUBJECT OF ONLY FOUR DECISIONS DURING THE NINETEEN-YEAR HISTORY OF ERISA, THREE OF WHICH ARE IN ACCORD WITH THE THIRD CIRCUIT'S DECISION BELOW.

As this Court is well aware, ERISA is a statute that has been the frequent subject of litigation since its enactment in 1974.

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8. Significantly, the court of appeals' analysis mirrors the analysis of this Court in *Guidry* which also relied upon the IRS regulations. *See Guidry, supra,* 493 U.S. at 685, n.10 (quoting 26 C.F.R. § 1.401(a)-13(b)(1) (1989)).

However, the issue presented by the instant petition has been the subject of only four reported decisions during the past nineteen years (since the adoption of ERISA), all but one of which are in complete accord with the decision of the Third Circuit below.[9] Petitioner himself admits that "most of the cases brought under § 409(a) do not involve fiduciary defendants who are also participants in the plan" (Pet. 7). Given that the purpose of certiorari is to resolve broad issues of general importance, rather than unique or *sui generis* cases, this case is not the proper subject of review by this Court. Given the infrequent treatment of the issue presented, this Court should await further development of the issue in the lower courts before addressing the issue.

Indeed, of the four decisions dealing with this rather obscure issue, only one has reached a different outcome, *Herberger v. Shanbaum*, 897 F.2d 801 (5th Cir.), *cert. denied*, 498 U.S. 817 (1990), and that case was based upon a patently faulty reading of *Guidry*. Thus, the *Herberger* court failed to recognize that *Guidry* did not involve an "offset," but rather dealt with the imposition of a constructive trust which was in the nature of a "garnishment." *See Herberger, supra*, 897 F.2d at 803. Moreover, *Herberger* simply misread *Guidry* as holding "that the remedial provisions of *ERISA* did not outweigh the anti-alienation provision" and that "the civil enforcement provision, 29 U.S.C. § 1132(a)(3)(b) . . . was not expansive enough to allow an offset." *Herberger*, 897 F.2d 803-804. In fact, *Guidry* did not so hold and did not involve a balancing of the civil enforcement provisions of ERISA against its anti-alienation provision. *See Guidry, supra*, 493 U.S. 365. The statute invoked by the Union in *Guidry* was the Labor Management Reporting and Disclosure Act (LMRDA), not ERISA. *Id.*

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9. *See Crawford v. La Boucherie Bernard Ltd.*, 815 F.2d 117 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 943 (1988); *Herberger v. Shanbaum*, 897 F.2d 801 (5th Cir.), *cert. denied*, 498 U.S. 817 (1990); *Pension Benefit Guar. Corp. v. Solmsen*, 743 F. Supp. 125 (E.D.N.Y. 1990).

While the analysis in *Herberger* was, thus, fundamentally flawed due to the Fifth Circuit's patent misreading of *Guidry*, the decisions in *Crawford v. La Boucherie Bernard Ltd.*, 815 F.2d 117 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 943 (1988), and *Pension Benefit Guar. Corp. v. Solmsen*, 743 F. Supp. 125 (E.D.N.Y. 1990), suffer from no such flaw. Both of these decisions correctly recognized, as did the Third Circuit below, that an offset or recoupment of benefits under the § 409(a) remedial provisions of ERISA where a fund fiduciary had breached his or her duty to the fund was not barred by the anti-alienation section of ERISA. *See Crawford, supra*, 815 F.2d at 119-120; *Solmsen, supra*, 743 F. Supp. at 129. Moreover, and again unlike *Herberger*, the decisions in *Crawford* and *Solmsen* contain extensive statutory analysis of ERISA. *See Crawford, supra*, 815 F.2d at 119-120; *Solmsen, supra*, 743 F. Supp. at 128-129. Thus, in following the holdings in *Crawford* and *Solmsen*, the Third Circuit chose to adhere to well-reasoned decisions which comport fully with *Guidry* on these seldom-litigated issues. No review by this Court is appropriate where the court of appeals correctly interpreted the statute at issue on an obscure, and infrequently presented question.

III.

THE THIRD CIRCUIT'S OPINION AVOIDED AN ABSURD RESULT THAT WOULD HAVE SUBVERTED THE PROTECTION OF BENEFICIARIES THAT IS AMONG THE PRIMARY PURPOSES OF ERISA.

Petitioner argues that the court of appeals ignored *Guidry* and the plain meaning of the statute in order to reach a decision that comported with its view of the equities (Pet. 19-20). This argument misconstrues the decision below which effectuates the remedial provisions in ERISA itself, rather than general equitable principles. As demonstrated above, the court of appeals was careful to adhere both to *Guidry* and to the plain meaning of the statute.

Both the majority and the concurrence below recognized that ERISA was enacted "to protect and ensure the availability of pension funds for retirees." *Coar, supra,* 990 F.2d at 1425 (Pet. App. Pa 35) (Becker, J., concurring). Petitioner defrauded the Fund out of more than $25 million, far more than he could ever have expected to collect in pension benefits. In effect, he has deprived the Fund's beneficiaries of assets and income to which they were rightfully entitled. Allowing him now to obtain more money from the Fund, above and beyond the vast amounts he has already removed by fraud, would completely subvert the purpose of ERISA.

Petitioner also attempts to present a "parade of horribles" to raise the truly absurd claim that the decision below will be harsh on "innocent" trustees (Pet. 7-10). However, in the nineteen-year history of ERISA, *none* of the four cases that have dealt with this issue have involved so-called "innocent" or merely "negligent" trustees, but rather have involved wrongdoers who have intentionally misappropriated Plan assets. *See supra* at 16-17. Petitioner's argument as to so-called "innocent" trustees is thus a red herring based on pure conjecture and speculation.

Furthermore, the gravity and importance of trustees' responsibilities should be no surprise to those individuals who voluntarily seek the office. Prospective trustees should not be encouraged to take such responsibility lightly. Under petitioner's reading of ERISA, only trustees who are wealthy and possessed of substantial non-benefit assets would be expected to make good any losses they cause the Fund. The more rational reading of the statute, and that embraced by the court below, holds trustees to the duty they undertook when they agreed to serve the Fund, regardless of their wealth, and encourages them to take the well-advised step of procuring the appropriate "Trustee and Officer" insurance to indemnify themselves against their own negligence. Along with the power of their position, trustees must also bear the

responsibility. Making trustee benefits subject to § 409(a) would only make "innocent" trustees more prudent and dishonest trustees more wary of abusing their position.

Finally, the court of appeals was not "giving in" to its own distaste for petitioner's criminal misdeeds. To the contrary, the Third Circuit simply applied traditional rules of statutory construction. Nevertheless, as the concurring opinion below noted, petitioner's construction of § 206(d)(1) — permitting a trustee to loot the funds of a Plan, and then to go back to the Plan with impunity to take out additional amounts for his "benefits" — reaches an "absurd" result which could not have been intended by Congress. *See Coar, supra,* 990 F.2d at 1425 (Pet. App. Pa 33-35) (Becker, J., concurring). *Demarest v. Manspeaker,* 498 U.S. 184 (1991) (an anomalous or absurd result should be rejected as plainly unintended by Congress).[10]

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10. Petitioner argues at length that the effect of the decision below when applied generally will be to inflict unjust losses upon basically "innocent" parties. (Pet. 7-10). However, petitioner does not address the effect of a decision in his favor. In cases dealing with single employer plans where the trustee is also the employer's principal *(see, e.g., Crawford, supra,* and *Solmsen, supra),* the trustee usually would be a substantial beneficiary of the plan. In such situations, where a trustee loots the fund in violation of his or her fiduciary duty, under petitioner's construction of ERISA, that same trustee would also be able to make a claim for benefits upon the very fund he or she had looted. Indeed, the breaching trustee, as the principal of the employer, is also likely to have a larger monthly benefit than most fund participants, further depleting the Fund. In fact, in the small plan context, the defrauding trustee could steal and take as benefits sufficient monies to completely deplete all plan assets. The result of this would be to doubly reward the wrongdoer and, more importantly, to shift entirely the economic risk of loss on to truly innocent plan participants.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — TRANSCRIPT OF ORAL ARGUMENT DATED MARCH 9, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
PHILADELPHIA COUNTY, PENNSYLVANIA

* * *

NOS. 92-5356/5359/5438/5439

ROBERT J. COAR

VS.

JOSEPH KAZIMIR; ROCCO MORONGELLO, in their Capacity as Trustees of the Pension Fund-Mid Jersey Trucking Industry-Local 701; WILLIAM LEVINE, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; DONATO D'SANTI, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; ROBERT DUKIK, in his capacity as Trustee of the Pension Fund-Mid Jersey Trucking Industry-Local 701; PENSION FUND-MID JERSEY TRUCKING INDUSTRY LOCAL 701

Joseph Kazimir, Rocco Morongello, William Levine, Donato D'Santi and Robert Dukik, in their capacity as Trustees of the Pension Fund Mid-Jersey Trucking Industry Local 701 and the Pension Fund Mid-Jersey Trucking Industry Local 701,

Appellants No. 92-5356/5438

Robert Coar,

Appellant No. 92-5359/5439

* * *

Appendix A

[2] * * *

Transcription from tape of an oral argument, which took place on March 9, 1993, beginning approximately 10:45 a.m., in the above-captioned matter. Transcription from tape taken at United States Court of Appeals For The Third Circuit, 21400 United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania 19106-1790, on Wednesday, March 10, 1993, beginning at 9:00 a.m., before CHRISTINE L. ALLMOND, Court Reporter and Notary Public, in and for the Commonwealth of Pennsylvania.

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Appendix A

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CIRCUIT JUDGES:

EDWARD R. BECKER

MORTON I. GREENBERG

JOSEPH F. WEIS, JR.

[4] * * *

THE COURT #1: Mr. Kaplan, Mr. Perle, fortunately this case is much simpler, maybe more difficult, but you got a simple clear-cut issue.

MR. KAPLAN: I think that's correct, Your Honor. My name is Roger Kaplan and I represent the appellants in this case, which

include the Pension Fund for the Mid-Jersey Trucking Industry, Local 701 and its trustees which have been named as defendants in this case.

Your Honor, I would like two minutes of rebuttal.

THE COURT #1: Permission granted.

MR. KAPLAN: Thank you. Now, Your Honor, the facts of the case are not terribly in dispute, but we have a former trustee who was ultimately convicted of RICO violation with respect to his tenure at the fund. And the predicate acts were the soliciting and receipt of kickbacks in connection with depleting twenty million dollars out of the fund. Ultimately, the fund also had obtained a [5] judgment, a civil judgment against that trustee in the amount of twenty-six million dollars on the ERISA claim and ninety-six million dollars on the RICO claim. After liability was established in the District Court on summary judgment the trustees of the fund determined to exercise a right of set-off and recoupment to stop paying that trustee his benefits on a monthly basis. The issue raised in the case is the issue that was not determined in *Guidry versus Sheet Metal Workers Pension Fund or Sheet Metal Workers National Pension Fund.*

THE COURT #1: Mr. Kaplan, even though *Guidry* reserved this precise question, what is it about the reasoning that would allow us to come to a different result from *Guidry*?

MR. KAPLAN: Your Honor, the reasoning of *Guidry* is what requires the court to come to the result in this case that we advocate for the following reasons — and I intend, Your Honor, to address my remarks almost exclusively to that question today, because we are not asking the Court to find and nor does [6] this Court need to

find an equitable exception to 206(d)(1). The last part of the Supreme Court decision in *Guidry* and the dicta in the *Patterson/Schumate* case is entirely irrelevant to what this Court needs to decide with respect to the statutory construction of Section 409(a), on the one hand in ERISA and Section 206(d)(1).

We are not asking for an equitable exception which would fit within the dicta of *Guidry*. What we are asking for is that this court construe 409(a) pursuant to traditional methods of statutory construction in order to divine the congressional intent.

THE COURT #1: Isn't the argument simply the 409(a) is specific? That there's a liability and the other section is just a general exemption?

MR. KAPLAN: Absolutely, Your Honor.

THE COURT #1: And, therefore, when you take the specific general dichotomy it works for you in this case rather than against you.

MR. KAPLAN: I — Absolutely.

THE COURT #1: Isn't that — isn't that [7] your whole — isn't it that simple?

MR. KAPLAN: Well, Your Honor, I wouldn't sit down after saying that, but I think that's a major part of the argument. *Guidry* starts with the proposition at page — at 375 to 76 of that decision which says, when "there is no clear intention otherwise that a specific statute will not be controlled and nullified by a general". In that case a court found that 501(b) of the LMRDA, which simply said, damages and other appropriate relief, was a general statute in

another statutory scheme, which could not countermand 206(d)(1) as an anti-garnishment statute. The court further held, and I think this is very important, it did not say that anti-alienation was immutable. That it always wins. What it said was, in that case, and quoting again, "the congressional intent would be effectuated — would not be effectuated by reading the LMRDA general reference to other appropriate relief as overriding the anti-garnishment provision of 206(d)(1). In this case the congressional intent is just the opposite.

[8] THE COURT #1: What do we do about the court decision around page 376, where it said there's a considered congressional policy to safeguard a stream of income for pensioners, even if that decision prevents others from securing relief for the wrong done to them.

MR. KAPLAN: Your Honor, the reason —that has to do with third parties seeking an attachment, an execution or a levy because —

THE COURT #1: They don 't —

MR. KAPLAN: Your Honor, with all due —

THE COURT #1: That's your argument?

MR. KAPLAN: It' s more than my argument —

THE COURT #1: The Court did not precede its discussion by saying that it applied only to third parties.

MR. KAPLAN: Well, Your Honor, the court did precede the discussion at pages 371 and 72, and specifically footnote ten, it

started with a definition of alienation as contained in the Treasury Regs, the Treasury Regs define — and the Treasury Regs relied on in our brief and our addendum to our brief. The [9] Treasury Regs define alienation and assignment as any direct or indirect arrangement whereby a party acquires a right or interest enforceable against the plan. It is a party acquiring a right or interest against a plan. By definition, alienation or assignment is a third party seeking to enforce its right or claim against the participant against the plan. That definition does not include actions by the plan itself, vis-a-vis the participants.

In fact, Your Honor, in the very next section of the regulations, the Treasury Regs give examples of situations which do not fall within its definition of alienation and assignment. Each and every one of those examples is a situation in which the fund itself is withholding the benefit from the participant.

The principal example of which is an arrangement by the fund to withhold future benefits in order to recoup overpayments of benefits in the past.

What's interesting in the Treasury Regs [10] is that that's not defined as an exception to alienation or assignment. It is defined as not being included within the definition of alienation or assignment.

Your Honor, what took place in the Supreme Court in *Guidry* was an — and the Supreme Court looked at the Treasury Regs to say that what is being attempted here is a constructive trust by a third party, which is the same thing as garnishment. Garnishment falls within the definition of alienation or assignment under the Treasury Regs.

THE COURT #1: Was the creditor in *Guidry* in any different

position than say a credit card company trying to collect?

MR. KAPLAN: No, exactly the same.

THE COURT #1: The fact that it was a union, still it's a separate entity.

MR. KAPLAN: In the eyes of the Supreme Court it was a — it was — in fact, the Supreme Court, I don't have the page, but the Supreme Court in *Guidry* specifically said, although, there is a tendency to, in fuzzy thinking, think of the union and the Pension [11] Fund as sort of the same, they are distinct, separate legal entities —

THE COURT #1: One more question, if you are right on your appeal then the other appeal is dead, right? It's the counsel fee appeal.

MR. KAPLAN: The counsel fee is dead, that's correct.

THE COURT #1: Okay.

MR. KAPLAN: Am I still on green?

THE COURT #1: You're still on green, that was a mistake.

MR. KAPLAN: Okay. Your Honor, let me —so, I think, looking at the Treasury Regs and applying Chevron and giving deference to the agency that has primary jurisdiction over this section, I think we have to defer to the agency's definition of alienation and assignment. And an issue is not even raised in this case concerning alienation or assignment as defined under the Reg. The second question that deals with statutory construction is the

issue that Judge Greenberg raised at the beginning of my presentation. And that's that section 409(a) is in fact a [12] specific statute which is very different than 501(b) of the LMRDA. Section 409(a) specifically places an obligation on the fiduciary and says that that fiduciary who is in breach, quote, "shall be" — "shall personally be liable to make good to such plan in any losses, shall restore to such plan any profits which the fiduciary made and shall be subject to such other appropriate equitable and remedial relief". The legislative history with respect to section 409(a), which is analyzed at length in *Crawford*, which is relied upon in our brief.

In *Crawford,* Judge Green looks at that legislative history and it's clear that Congress intended section 409(a) to provide the full range of all available remedies to remedy a breach of fiduciary duty. In fact, the legislative history demonstrates that the fiduciary duty sections of ERISA were the very centerpiece, the very centerpiece of the ERISA statute in 1974.

Crawford further notes as does the Supreme Court at length in *Firestone versus* [13] *Bruch* decided a year before Guidry, that ERISA's legislative history — I am quoting from *Bruch*, "ERISA's legislative history confirmed that the Act's fiduciary responsibility provisions codify and make applicable to ERISA fiduciary principles developed in the evolution of the law of trusts". And as Judge Green notes, in Crawford, the law of trusts clearly gives a trustee a set-off and recoupment remedy against a breaching trustee who also happens to be a fiduciary. Scott is very clear on that on the law of trusts.

The situation we're faced with is that if the Court finds against us we have the incongruous result, which was rejected by the Supreme Court in Firestone, the incongruous result that we had more protection against fiduciary breaches pre-ERISA under

common law than we would had under ERISA, under the statute, if it's construed that 409(a) does not take precedence over 206(d)(1).

THE COURT #1: Yes, but 206(d)(1) was passed by Congress.

[14] MR. KAPLAN: There's no question, Your Honor —

THE COURT #1: I mean, that's just tough luck.

MR. KAPLAN: I understand that, but there is no question in my mind, based upon this legislative history, that Congress never intended a breaching fiduciary to deplete the assets of a Pension Fund as he did in this case.

For example, in *Solmsen,* which we rely on, the fiduciary was responsible for depleting 60 percent of the assets of the fund. If this Court finds against us it means that that fiduciary having depleted the assets of the fund can go back to the well a second time. In *Solmsen,* the fiduciary, and typically in a single firm trust, the fiduciary is the highest paid employee in the company and it's usually the CEO. The fiduciary can go back and dip into that fund again. In Solmsen he was going after the second 40 percent. He would leave nothing —

THE COURT #1: That's not going to happen [15] here.

MR. KAPLAN: But, Your Honor, I know it's not, but the point is we're arguing a legal principle that would have the same application in that case that it would in this case. There's no question — and I think *Firestone* really answers the point, In *Firestone v. Bruch,* the Court refused to apply a universal, arbitrary and capricious standard for review of fiduciary action. A principal reason, at page 114 of that opinion is, that by adopting that standard ERISA would require us to impose a standard that would afford

less protection than enjoyed before ERISA was adopted. I think that answers the argument, Your Honor.

Now, with respect — with respect to the statutory intent on 409(a), if I may take a couple of minutes. I think the only case that supports the appellee's position is the *Herberger* case. *Herberger* is interesting because it completely, utterly —

THE COURT #1: It's the only Court of Appeals case after *Guidry.*

MR. KAPLAN: It is, but it completely and [16] utterly misread *Guidry* and got *Guidry* backwards, Your Honor. The reason why is, first, it looks at *Crawford* and says *Crawford is* persuasive. However, I am compelled to reach a different result because *Guidry* compels me to do so. It then reads *Guidry* and says two things about *Guidry,* it says number one, *Guidry* dealt with an offset and disallowed an offset. *Guidry* did not deal with an offset argument. *Guidry* dealt with a constructive trust, which the Supreme Court said was a garnishment. I am referring to page 803 to 804 of the *Herberger* decision. Next, compounding that error, the 5th Circuit in *Herberger* said, this is how it summarizes the *Guidry* decision, and I am quoting, "specifically, the Court in *Guidry* stated, that the remedial provisions of ERISA did not outweigh the anti-alienation provision". Still quoting, "in *Guidry* the Supreme Court held that the civil enforcement provision of ERISA under section 1132(a)(3) was not expansive enough to allow an offset". In other words, the *Herberger* Court thought, [17] based upon its decision, that the Supreme Court was looking at a tension between 1132(a)(3) under ERISA and 206(d)(1). The *Herberger* Court completely missed the point that the Court was not weighing an ERISA provision against an ERISA provision. The court in *Guidry* was weighing 501(b) of the LMRDA, a completely different statutory scheme, against 206(d)(1).

THE COURT #1: They didn't read it right, but I guess you're — as we sit here now, there's a conflict among the circuits, isn't there? Between *Crawford* — there's already a conflict among the circuits.

MR. KAPLAN: There is a case in the Eastern District of New York, Judge Nickerson —

THE COURT #2: That's the one that won your case. That went your —

THE COURT #1: Yes, but I mean among the Courts of Appeals there's a conflict?

MR. KAPLAN: There is a conflict, except the conflict, to be perfectly accurate —

THE COURT #1: But one case is [18] pre-*Guidry*?

MR. KAPLAN: That's right. Although, I think the *Crawford* analysis is completely consistent —

THE COURT #1: But what was Judge Nickerson's analysis? Judge Nickerson's analysis was a smell test. He couldn't stand the result and I can understand it. I think it is — I think it is a terribly unpalatable result to decide against you.

MR. KAPLAN: Judge Nickerson may have applied the smell test, but what he articulated was that he examined the decision in *Crawford* and he examined the decision in *Herberger* and he came to the conclusion that the *Crawford* decision, based upon its in-depth analysis of the legislative history was the correct analysis. And that that analysis survived *Guidry* and which incidentally

specifically reserved on this issue. So whatever *Guidry* said about equitable principles did not stop it from reserving on the issue.

Your Honor, if I may conclude, the [19] original point, we're not asking this Court to give the Pension Fund a remedy against whatever survivors or survivorship interests may come after Mr. Coar — after Mr. Coar, his spouse or his children if they have survivorship interests. We are solely seeking a remedy that as Mr. Coar's monthly benefits come due that the fund is permitted to set that off. A set off in equity is simply a defense. A recoupment and set off is not the assertion of a claim, it is our defense.

THE COURT #1: So, is what you are saying, Mr. Kaplan, that if something unfortunate should happen and Mr. Coar should no longer be with us a year from now, then you'd no longer have a set off, but it would go to his family?

MR. KAPLAN: I am saying that the only issue raised in this case is our right to a set off and recoupment with respect to the benefits that are due Mr. Coar. We've never suggested in this case or anywhere else, Your Honor, that we would have any right of recoupment or set off with respect to other [20] persons, either a surviving spouse or his children.

THE COURT #1: Okay.

MR. KAPLAN: And, in fact, the letters that preceded this case asserted the position on behalf of the fund, which ultimately led to the litigation that we were seeking to set off his benefits only.

THE COURT #1: We understand your position.

MR. KAPLAN: Thank you.

Appendix A

THE COURT #1: Mr. Perle.

MR. PERLE: Your Honor, I would like to reserve recross of rebuttal.

THE COURT #1: No, you —

THE COURT #2: He's got a cross appeal.

THE COURT #1: You got a cross appeal on your counsel fee.

MR. PERLE: Your Honor, what I would like to do is address anti-alienation (ph) first and then proceed to the *Ursic, Ellison* question.

THE COURT #1: Well, you better — you're not going to get to *Ursic, Ellison* unless [21] you —

MR. PERLE: I recognize that. Taking a look at 409(a) I think — the basic premise or necessary premise for the argument is that, in fact, the text clearly does indicate, does compel or indicate an intent to apply a remedy against pension benefits as it would be received by a fiduciary, it doesn't do that. It speaks in broad terms. What it really does is simply create a cause of action, it indicates that breach of fiduciary duty — breach of an ERISA duty creates a right of a general right of recovery on behalf of the pension fund.

THE COURT #1: Wouldn't it be like just the bare minimum then that if the recovery is established and the liability is fixed, which it is for multi-millions of dollars, that at a bare minimum when you wouldn't have to pay other money to the judgment debtor. It would seem — it would seem so clear that — it's so specific that you owe the money.

MR. PERLE: Your Honor, I think what you're doing, with all due respect, is what [22] Judge Nickerson did, he's saying this doesn't look right, it's not fair.

THE COURT #1: He said it stinks.

MR. PERLE: It stinks.

THE COURT #1: Is that wrong? Incidentally, is it wrong to see if something does stink when you are reading along?

MR. PERLE: There is nothing wrong with it, Your Honor. As a matter of fact, in this case, and I think what is appealing in terms of the argument in front of you — argument of the fund, is that there's a symmetry here unlike with another creditor. There is a symmetry, I hope you see that. And that's — I think where their argument has a special appeal. But I think if you look at the text of 409(a), what it does is create a cause of action. It also speaks in general terms about equitable relief. It doesn't say anything about overcoming the alienation provision. Now, when the fund — when the fund takes the position that it is taking in this case, it's taking the position as a creditor, it's not taking it internally. In the matters that are [23] addressed in the Treasury Regs those are situations that deal with administrative mistakes by the fund, where there has been an overpayment. So in effect, when they talk about recoupment, all they are saying is we don't want to pay the same thing twice. We're saying that pension has already been paid. That's all those cases talk about, which is why they don't deal with alienation.

The fund, in this case, is wearing two hats. It's the payor of the pension and it's the creditor. If you look at 409(a) it creates a cause of action. It doesn't say how you collect it. I think the same point is

made — was made in *Guidry,* because the text of the pertinent provision of the LMRDA is very similar to 409(a). It creates a cause of action. The point is made very clear by the Court. That's all it does. It talks generally about how equitable relief is available, but in 409(a) I think it's particularly instructive that there's a reference there or the interpretation there usually provided is the right of a person in a [24] pension fund or the trustees to take action against an (inaudible) fiduciary (inaudible). And I think that's the clear purpose of the equitable relief language there, but 409(a) doesn't deal with the specific situation we have here.

I think what is very instructive is what the Supreme Court said in *Patterson versus Schumate,* which came out after *Guidry* last year. I think what they said was, we really meant it when we said no equitable exceptions. It's up to Congress they pointed to — they pointed to what Congress had done with respect to matrimonial support orders, when Congress enacted a specific statute to overcome what would have been the rule under 206. And in effect said, if you don't like the result in this case, you don't like the result in *Guidry* or another case it's up to Congress — to petition Congress, get Congress to change the law. No equitable exceptions.

Now, I think when you look at *Crawford,* you look — certainly when you look at the *Solmsen* case, what they are are basically an [25] appeal to some notion of fundamental justice. It's not right, it stinks, it's unconscionable, it's unpalatable. All the adjectives that Judge Barry — that are replete in Judge Barry's opinion, but unlike the Court there, I think, Judge Barry, unlike the Court in *Solmsen,* I think Barry correctly recognized that *Guidry* and more lately in *Patterson versus Schumate,* the Supreme Court said no equitable exception, but what you are talking about under any guise is an equitable exception. There's no difference when a pension fund is a

creditor from the position of the union in *Guidry.* Certainly the equities, the equities here are virtually indistinguishable.

THE COURT #1: Mr. Perle, would you engage Mr. Kaplan's argument a little more directly? His statutory construction argument.

MR. PERLE: I think the statutory construction argument basically — or assumes that 409(a) — 409(a) in some way addresses the particular result that he is seeking here. [26] Mainly that pension benefits — that pension benefits are — can be effectively garnished, garnishee on behalf of the pension fund when a pension fund alone or creditors has the judgment. I don't think the text says that or suggests it in other than a most general term. So, I think — I think we then are — go back to the principle clearly articulated in *Guidry,* which is that the only exceptions — there are no equitable exceptions, no exceptions that can be read into the text, that based on some doctrine which has been handed down from common law, the only exceptions are exceptions that have been inscribed in the statute by Congress that are specific, that say exactly what you want and what you maintain they should say, as Congress did with respect to matrimonial lawyers in '84 when they amended the statute.

And I think the problem that Mr. Kaplan has is that — is the particular provision he's talking about goes no further than the equivalent provision in *Guidry,* under the LMRDA.

[27] THE COURT #1: Labor Management, Reporting and Disclosure Act.

MR. PERLE: Labor Management Reporting and Disclosure Act. They are virtually identical. And I think what the Courts in

Appendix A

Patterson versus Schumate said, if we allow an exception based on a federal statute creating a remedy, instead he calls a federal statute has created a remedy, pretty soon you have an exception which swallows the whole rule. At least the creditor's rights have been established under federal law. And I just don't see *Patterson* as being capable of being read as anything other than a general, across-the-board, rejection of the kind of equity based analysis that Mr. Kaplan is offering. If the statutes say among the remedies we contemplate is the right of a pension fund to attach or garnishee pension benefits of the pensioner, I would concede that Congress has spoken and indicated an intent to permit the pension fund to do what it is intended to do in this case. They didn't do that in 409(a). They spoke only in [28] the most in general terms. They created a cause of action. They said if you breach fiduciary duty as defined under ERISA, if you're an ERISA fiduciary and breach that duty, you could be liable in damages for two things, one, the loss created. And, two, if it involves kickbacks and what they call profits then for a return of any profits.

THE COURT #1: You see a gap here? It's our duty, isn't it, if there's a gap in the congressional scheme to try and figure out what we think Congress' likely intent would be?

MR. PERLE: Your Honor, I would agree if it's in an area where the Courts have been inactive particularly the Supreme Court. But I think the Supreme Court has given general guidance.

THE COURT #1: May I ask you a question? You have a cross appeal here with respect to the counsel fee. If I recall this correctly, Judge Barry first indicated that you would get a fee, but she didn't quantify the amount. And then on a reconsideration she said you [29] would not get a fee; is that correct? What's the standard of review?

MR. PERLE: The standard of review, I believe, is plenary review because I think Judge Barry misconstrued the applicable stands. This really —

THE COURT #1: That's got nothing to do with her changing her mind.

MR. PERLE: That has nothing to do with changing her mind.

THE COURT #1: She certainly has the right to change her mind.

MR. PERLE: Yes, certainly had a right to change her mind. But what she said was, "I don't think I have discretion here to award the fees". Mainly she went down —

THE COURT #1: Generally speaking, the counsel fee awards or refusal to make counsel fee awards is abuse of discretion. What you are saying is that she made some legal errors here in her understanding of the *Ursic* — that's Judge Weis' test?

MR. PERLE: That's correct, Your Honor. And I think she made a legal error in this [30] respect. *Ursic* — the *Ursic* test was drawn from two prior cases, *Iron Workers versus Boeing* and the *Hummel* case out of the 9th Circuit. They set forth the five part test.

THE COURT #1: You're disappointing me, I though he thought it up himself.

MR. PERLE: Well, he may — certainly (inaudible), Your Honor, but I don't think Judge Weis needed to deal with the issue we're dealing with here. In *Boeing* the fourth factor was articulated on the basis — and *Hummel* was articulated on the basis of that

benefits the numbers of the claimants as a whole. Or to resolve an important question under ERISA. Same standard under *Hummel.*

Now, I think what's interesting is that in *Ellison*, what the Court said there was we can't really treat — we don't think that you should apply the special circumstances test because we view ERISA cases as generally or the typical ERISA case as generally different than civil rights cases, they don't involve transcendent questions of national policy and so forth. And they don't involve benefit [31] calculations and so on. And the Court dwelled on that as — and cited *Boeing.*

THE COURT #1: Well, then that analysis is applicable here.

MR. PERLE: It's not applicable here.

THE COURT #1: This is sort of a very narrow question here. You know you may say that's a great issue. And I suspect, Mr. Perle, that if we decide this against you, we will in effect be handing you a prize ticket that very few lawyers get in a lifetime.

MR. PERLE: Well, I am not —

THE COURT #1: A ticket to the United States Supreme Court.

MR. PERLE: Well, I am not here to accept a ticket, but I think what's important, Your Honor, has touched on it, this is a case which has national significance, which could very likely go to the Supreme Court, which will be instructive to every pension fund across the —

THE COURT #1: If we decide against you it's going there, believe me.

[32] THE COURT #2: Well, I mean how often does this problem come up?

MR. PERLE: Your Honor, it comes up much more often than you would expect.

THE COURT #1: That's grim.

MR. PERLE: It doesn't always come up in the Bob Coar cases, Your Honor. It comes up probably much more often in situations where you have an incumbent board of trustees who decide, after they have been in office a few months, that the old people have done a lot of questionable things and start lawsuits against them based sometimes on rather technical, alleged technical violations of ERISA. You wind up with somebody who is 68-years-old who is not working, living on a pension, having to defend a large lawsuit based on his service as a trustee. That's the reality of the situation.

THE COURT #1: But the court case — that's not the court case unless and until the trustees get the judgment. In other words — in other words, the mere fact the suit was brought they never took the position that, [33] if I understand this, they didn't say that they could withhold the payment until after they got a judgment.

MR. PERLE: One — one other — you're — no, they didn't have a judgment, Your Honor, they withheld payment before they got the judgment. There was a partial summary judgment on liability only.

THE COURT #1: All right.

MR. PERLE: And began withholding payments.

THE COURT #1: But this case was unique, though your client went to jail for what they did against the fund.

MR. PERLE: It was unique — it was unique, but the principles are the same. It's identical really to *Guidry.* But apart from that any time there is a judgment against a former fiduciary you're exactly in the same situation. It may not be as unpalatable —

THE COURT #1: If — only if the judgment creditor is the fund.

MR. PERLE: Only if the judgment creditor is the fund.

[34] THE COURT #1: Mr. Perle, the counsel fee issue has been extremely well briefed. I — are you willing to leave it to the briefs or —

MR. PERLE: I would like to make a point on your *Ellison,* in that I think what *Ellison* was really talking about when it discussed *Boeing* was how *Boeing* dealt with the case which were counsel fees should be paid, not because of the benefit to the claim itself, but because of the national significance. The vindication of purposes of ERISA (inaudible) talks about that. And I think the reason it never comes up in this circuit is because every case, probably the closest case that — there was a case attempted to the court to deal with the issue is the *Brose* (ph) case, Your Honor, but that case was decided on the basis that there was a clear benefit to the members of the plan as a whole. I don't think there's ever been a case where the issue is significant to the case or not important to the case resides in the fact that it involves an issue, which is of national importance and [35] transcends importance.

THE COURT #1: We have your position. Thank you, Mr. Perle. Mr. Kaplan?

MR. KAPLAN: Yes, briefly, Your Honor, I agree —

THE COURT #1: You better get on the tape, sir.

MR. KAPLAN: I agree that we've fully covered the attorneys fee in the brief and leave it in the briefs. Just a few points, number one, counsel said that 409(a) creates a cause of action. It does not create the cause of action, 409(a) is in the fiduciary sections of ERISA which imposes the obligation on the fiduciary to restore losses, return profits and be subject to other appropriate equitable and remedial relief. The cause of action to enforce those duties, which are freestanding duties, is found in section 502(a)(3). Unlike section 501(b) of the LMRDA, which does not even create the cause of action on its face with respect to its union, it creates a cause of action in member, but does not create the cause of action in the union itself as *Guidry* [36] recognized in footnote 16 of the decision.

Secondly, when Guidry said at the end of the decision that it is not creating a general — and it used these words, "it is not creating a general equitable exception to ERISA's prohibition in section 206(d)(1) as an anti-garnishment statute", it used those words. We will not create a generalized equitable exception to 206(d)(1) as an anti-garnishment statute. The reason why is they said they felt if they did that in every case a third party creditor could raise the equitable considerations which would swallow the rule. The enforcement of 409(a) pursuant to the legislative history which we've suggested to this Court, would not swallow that rule at all. In fact, we're not seeking a garnishment remedy, the remedy which we have enforced under 409(a) is a recoupment and set off, which

in equity is not a claim at all. It is a defense to Mr. Coar's claim for his benefits. It is a netting now of cross debts.

THE COURT #1: Thank you. This case was extraordinarily well argued —

[37] THE COURT #2: He has a couple minutes left.

THE COURT #1: Your couple of minutes left is on the counsel fee which Mr. Kaplan didn't argue.

THE COURT #2: That's right because it's his cross appeal.

THE COURT #1: This case was extraordinarily argued. We direct counsel to communicate with a clerk and arrange for a transcript of the oral argument. The court will take a five minute recess.

* * *

(Whereupon, the oral argument was concluded.)

* * *

Appendix A

CERTIFICATE

I, CHRISTINE L. ALLMOND, a Court Reporter in and for the Commonwealth of Pennsylvania, hereby certify that the aforegoing is a true and accurate transcript of the oral argument.

I FURTHER CERTIFY that I am neither attorney nor counsel for, nor related to or employed by, any of the parties to the action in which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed in this action, nor am I financially interested in this case.

s/ Christine L. Allmond
CHRISTINE L. ALLMOND
COURT REPORTER